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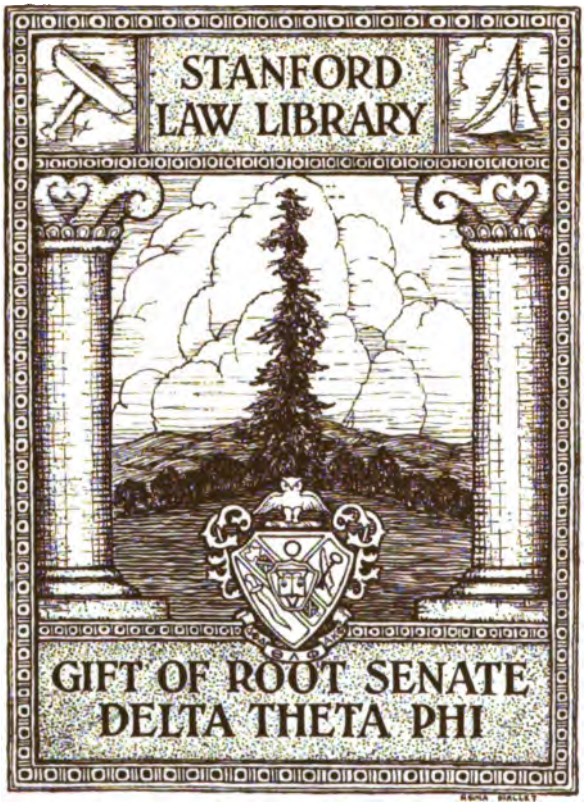
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A

TREATISE

ON THE LAW OF

INSURANCE,

IN FOUR BOOKS;

I. OF MARINE INSURANCES,
II. OF BOTTOMRY AND RESPONDENTIA,
III. OF INSURANCE UPON LIVES,
IV. OF INSURANCE AGAINST FIRE.

By SAMUEL MARSHALL,
SERJEANT AT LAW.

IN TWO VOLUMES.

VOL. I.

Laudo mercatorem, qui fidem, etiam contra leges datam, ſervat; ſed, et laudo judicem, qui fraudes et nequitias mercatorum non fovet, et reſcindit pactiones, quas lex reſcindi jubet. Judicis eſt leges ſequi; nec diſputare an turpiter faciat aſſecurator, qui fidem datam violat.—Eſto, turpiter faciat; ſed, et turpiter facit qui contra leges paciſcitur.

Bynk. Quæſt: jur. priv. lib. 4. c. 5.

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PREFACE.

THE deſign of the following work has been to collect from every authentic ſource, and to aſcertain, with as much preciſion as the ſubject would admit of, the genuine principles of the law of inſurance; and ſo to arrange and methodiſe them, that not only lawyers, but merchants and others, might, without much difficulty, acquire a competent knowledge of them.

It is now many years ſince I firſt conceived the idea of attempting ſuch a work. But after I had made ſome progreſs in it, I perceived that, if completed upon the plan I had adopted, it would be found too abſtract and elementary, to afford that aſſiſtance to the commercial world, or even to the profeſſion of the law, which it was my ambition to render to both.—I perceived that the leading principles which govern contracts of inſurance lie within a narrow compaſs; and that it is only the application of thoſe principles to particular caſes, that could form a work of general utility. My averſion to retrace my former ſteps, and to go again over the ground I had ſo recently trodden, concurring with other circumſtances, induced me, at that time, to lay aſide my deſign; and it was not till lately that I determined to reſume it. But though, in my new undertaking, I have adopted a different plan, and made a new arrangement of the ſubject, ſtill I found that my former

reſearches, and the collections I had made, greatly facilitated my labour.

In works of this nature, the greateſt attention to method is neceſſary. Their utility in practice, in a great meaſure, depends on their being properly arranged. Method, however, is only uſeful ſo far as it conduces to perſpicuity. Too ſtrict an adherence to methodical arrangement only defeats the end which is meant to be attained by it. A multiplicity of diviſions and ſubdiviſions only ſerve to burthen the memory and weary the patience. I have therefore avoided, as much as poſſible, diviſions too large and comprehenſive, on the one hand, and too trifling and minute, on the other.

The different branches of marine inſurance ſo blend themſelves with each other, that the forming of any diſtinct and ſatisfactory analyſis of it, is a taſk of no inconſiderable difficulty. In the various treatiſes on this ſubject which I have had occaſion to examine, I have ſeen no arrangement that I could entirely approve.—Of the arrangement now adopted, the reader will be able to form his own judgment, upon inſpection of the following analyſis. It will there appear that the ſubject has been divided, as nearly as it could be, according to the natural order of events, from the firſt idea of the contract, till the final cloſe of the tranſactions upon which it is to operate, or which ariſe out of it.

The numerous caſes that have been decided in the courts of *Weſtminſter*, upon queſtions of inſurance within the laſt 60 or 70 years, afford the beſt materials for a treatiſe on this ſubject. They at once ſupply the rules of law, and ſhew the application of them.—And as the utility of a work

a work of this nature greatly depends on its being as complete as poſſible within itſelf, ſo as to render a recurrence to other books ſeldom neceſſary, I have, in order to give the preſent work this advantage, in as great a degree as the limits I had preſcribed to it would admit, introduced into it all the decided caſes I have been able to collect, upon each branch of the ſubject, rejecting ſuch only as I deemed unworthy of notice.—In abridging theſe caſes, I have obſerved one uniform rule. Each will be found to conſiſt of three diſtinct parts;—the facts, the deciſion, and the reaſons aſſigned for it.—Where the deciſion of a caſe cannot be well underſtood, without ſhewing the points inſiſted upon in argument, theſe are briefly ſtated. —But though I have taken great pains to ſhorten each caſe as much as the plan of the work would admit, I am ſorry to find the book ſwelled to a ſize conſiderably beyond that to which I had hoped to confine it.

A few of the caſes have never before been in print. Some others I have cited from manuſcript notes, which ſeemed preferable to any hitherto publiſhed.

Under each head I have endeavoured, with the requiſite perſpicuity, to lay down the principles of the law, as I have been able to collect them from decided caſes, and from the beſt authorities, ancient and modern, which I have been able to procure.

There is ſcarcely any contract which affords a greater number of queſtions of doubt and difficulty than that of marine inſurance. Though the principles of the law applicable to this contract, are, in general, well defined; yet the policy being uſually of one uniform tenor, and the tranſactions

upon which it is to operate, infinitely various and complicated, the conflicting rights of the parties are often ſo equally balanced, that it is impoſſible to decide between them, without ſometimes reſorting to very nice diſtinctions. It often happens, too, that the real juſtice of the caſe, as between the parties, muſt yield to the ſtrict rules of law: And it ſeems to be a general ſubject of complaint, in moſt commercial countries (*a*), that, upon ſuch occaſions, courts of juſtice are ſometimes tempted to forſake the rules of law, and to lean in favour of the ſuffering party. It is not to be wondered at, then, if the doctrines delivered from authority in *Weſtminſter Hall* ſhould be found, in ſome few inſtances, to be irreconcileable with the true principles of the law of inſurance.

It is ſaid that good faith ſhould preſide in all the tranſactions of commerce, and equity in the deciſion of the queſtions to which it gives riſe.—That good faith ſhould preſide in all the tranſactions of commerce, is a truth which cannot be too frequently repeated, or too forcibly inculcated.—And that equity ſhould, on proper occaſions, have its due weight in the deciſion of commercial queſtions, I am alſo ready to admit. But, by equity I would not be underſtood to mean thoſe wild and fanciful notions of right, in which no two men can agree. I mean that rectitude of judgment, which is the reſult of natural reaſon, enlightened and directed by the wiſdom of the law. Under pretence of equity, the law is not to be forſaken. Where that is clear, it muſt prevail, however hard it may ap-

(*a*) Vid. *Bynk.* Quæſt. jur. priv. lib. 4. c. 5; *Straccha* p. 541, n. 6; *Emerig.* tom. 2, p. 355.

pear

pear in particular caſes. *Hoc quidem perquàm durum eſt, ſed ita lex ſcripta eſt.* It is ſafer, perhaps, to rely on the conſcience of the law, than on the conſcience of any man, however wiſe and virtuous he may be. *Omnia ſunt incerta, cum à jure diſceſſum eſt. Nec præſtari, quidquam poteſt, quale futurum ſit, quod poſitum eſt in alterius voluntate, ne dicam libidine* (*a*).

Wherever I have found any deciſion, or any doctrine advanced, which militated againſt any acknowledged principle of law, I have, with a proper freedom, but with decency and reſpect, pointed them out to the notice of the reader, with ſuch obſervations as I thought it my duty to make on them. I have not, however, unneceſſarily ſtepped aſide to make captious objections. I have only ſought, where the occaſion called for it, to reſtore the true principles of the law; and the better to enable me to do ſo, I have availed myſelf of the works of foreign writers of acknowledged authority upon the law of nations, upon marine law, and the law of inſurance; and I have freely had recourſe to them, wherever their aſſiſtance would enable me to clear up a doubt, or to ſolve a difficulty.

Nothing can more promote the true intereſts of commerce, than that the law, which ſhould regulate the contracts of merchants, ſhould be well underſtood. If the preſent work ſhould at all conduce to that end, or, in any material degree, advance the general proſperity of my country, my pains will be ſufficiently rewarded.

With reſpect to *Bottomry* and *Reſpondentia*; though theſe contracts are not at preſent much in uſe in this country, I have collected from the *Roman* law

(*a*) *Cic.* ad fam. lib. 9, epiſt. 16.

and from foreign authors, ſuch materials as ſeemed neceſſary to enable me to form a conſiſtent treatiſe on this branch of the ſubject.

Inſurance upon Lives, and *Inſurance againſt Fire*, are now become very important contracts in this country. Upon each of theſe I have put together all the materials I could collect, and have digeſted them into ſuch a form, as ſeemed moſt likely to render thoſe parts of the book uſeful to ſuch perſons as may have occaſion to conſult them.

Having thus ſhortly explained the nature and deſign of this work, I now, with conſiderable diffidence, ſubmit it to the judgment of my own profeſſion, and of the commercial world; *Poſtulans a lectore, ut ſi quid ſuperfluum vel perperàm poſitum in hoc opere invenerit, illud corrigat et emendet; vel conniventibus oculis pertranſeat; cum omnia habere in memoria, et in nullo peccare, divinum ſit potius quam humanum* (*a*).

SAMUEL MARSHALL.

Serjeant's Inn,
Feb. 2d. 1802.

(*a*) *Bract. de leg.* 1.

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A TREATISE

A

TREATISE

ON THE

LAW OF INSURANCE.

BOOK THE FIRST.

CHAP. I.

INTRODUCTION.

Of Insurances in general.

INSURANCE is a contract whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other, against certain perils or risks to which he is exposed, or against the happening of some event (*a*). The party who takes upon himself the risk is called the *insurer*, sometimes the *underwriter*, from his subscribing his name at the foot of the policy; the party protected by the insurance is called the *insured*; the sum paid to the insurer, as the price of the risk, is called the *premium*; and the written instrument, in which the contract is set forth and reduced into form, is called a *policy of insurance*.

Definition of insurance.

(*a*) Contractus assecurationis, id est avertendi periculi, dicitur contractus innominatus. FACIO UT DES, DO UT FACIAS, unde debet regulari juxta naturam contractuum quibus assimilatur; assimilatur autem emptioni et venditioni, propter prætium quod datur ratione periculi; quia qui assecurationem facit propter prætium, dicitur emere eventum periculi. *Rotæ Genuæ, decisio* 3. *n.* 28. *decisio* 39. *n.* 9.

Abuſes of inſurances reſtrained.

The riſks againſt which inſurances may be made are infinite. Formerly great frauds were practiſed upon ignorant and unwary perſons, under colour of inſurances of different ſorts, which the legiſlature found it neceſſary, from time to time, to repreſs. It appears that, in the reign of Queen *Ann*, ſeveral perſons opened offices for making inſurances on *marriages*, *births*, *chriſtenings*, *ſervice*, &c. whoſe fraudulent practices were ſoon found ſo injurious to the public, that by the ſtat. 9 *Ann. c.* 6. *ſ.* 57. a penalty of 500 *l.* is impoſed on every perſon ſetting up ſuch office, and 100 *l.* on every perſon making ſuch inſurances in any office already ſet up.

But the moſt miſchievous ſpecies of theſe fraudulent inſurances is that upon *lottery chances*, which, long after the paſſing of the above act, ſprung from that ſpirit of gaming which public lotteries muſt always excite in the people. Theſe, however, after many unſucceſsful endeavours to reſtrain them in the annual lottery acts, have, by the ſtat. 27 *G.* 3. *c.* 1., which was made expreſsly for that purpoſe, been conſiderably diminiſhed.

The inſurances of greateſt public utility, and to which the following work will be confined, are,

1. *Marine inſurances*, including the ſubject of *bottomry* and *reſpondentia*, which are a ſpecies of marine inſurance:

2. *Inſurances* upon *lives*; and

3. *Inſurances* againſt loſſes by *fire*.

The firſt of theſe will be the ſubject of the preſent book.

Marine Inſurances.

Marine inſurances are made for the protection of perſons, having an intereſt in ſhips, or goods on board, from the loſs or damage which may happen to them from the perils (*a*) of the ſea, during a certain voyage, or a fixed period of time (*b*).

The

(*a*) In compliance with cuſtom the word *peril* is here uſed in a ſenſe in which it is not uſually underſtood. It does not here mean *danger*, *hazard*, *jeopardy*, according to its common acceptation; for to ſay that a loſs was occaſioned by a particular peril, would, according to that acceptation, be to ſay that the loſs aroſe from the *danger* of ſuch loſs. In inſurance the word peril generally

The utility of this contract conſiſts in the protection it affords to maritime commerce, by dividing loſſes, when they happen, between many, ſo as to make them fall lightly upon each, and thus enables individuals to embark their whole capitals in hazardous enterpriſes. Without inſurance, foreign commerce could only be carried on by the few who are wealthy enough, or bold enough, to run alone the riſks which neceſſarily attend the proſecution of it. Theſe would engroſs all maritime commerce to themſelves, and their profits, for want of competition, would be immoderately high. Their utility.

The utility of marine inſurances cannot be better expreſſed than in the words of the preamble to the ſtat. 43 *Eliz. c.* 12. which recites that, 'By means of 'policies of inſurance it cometh to paſs, upon the loſs 'or periſhing of any ſhip, there followeth not the un- 'doing of any man; but the loſs lighteth rather eaſily 'upon many, than heavily upon few; and rather up- 'on them that adventure not, than thoſe that do ad- 'venture; whereby all merchants, eſpecially of the 'younger ſort, are allured to venture more willingly 'and more freely.'

Much pains and induſtry have been employed in fruitleſs endeavours to diſcover the origin of marine inſurances. This, like every attempt to trace the firſt imperfect beginnings of thoſe inventions which have ariſen by imperceptible degrees out of human neceſſities, has only terminated in doubt and diſappointment. Some enquiry, however, upon this ſubject, may be expected in this place; and yet the moſt careful reſearches ſcarcely enable us to aſcertain about what time this contract firſt came into general uſe even in *Italy*, where it ſeems to have had its origin. Whether their origin can be traced.

generally ſignifies the *happening* of the event or misfortune of which danger was apprehended.

(*b*) Vide *Valin. ſur* art. 1. h. t. p. 26.—Aſſecuratio eſt conventio de rebus tutò aliundè transferendis, pro certo præmio, ſeu eſt averſio periculi. *Stypm. pars* 4. c. 7. n. 262.—Averſio periculi ita dicta quod aliquis alterius periculum in mari averſum it, aut in ſe recipit. *Loccen.* lib. 2. c. 5. n. 1.

Cleirac's account of the origin of insurance.

Cleirac, in his commentary on the first article of *Le Guidon*, following *Giovan Villani* in his universal history, says that policies of insurance and bills of exchange were unknown to the ancient *Roman* jurisprudence, and were the invention of the *Jews*, when they were banished from *France* by *Dagobert*, *Philip Augustus*, and *Philip the Long*, to enable them to draw from thence the money and goods which they had concealed, or deposited in the hands of their friends before their departure. That they withdrew their money by means of short notes expressed in few words, such as are still used in bills of exchange. That, in order to withdraw their effects, their suspicions suggested to them the first rude beginnings of policies of insurance, whereby, *by their jewish arts*, all the risk and danger of the voyage fell upon the insurers in consideration of a *present*, which was called a premium. So that, according to *Cleirac*, bills of exchange and policies of insurance are of *jewish* birth and invention, and have nearly the same name,—*Polizza di cambio*, *Polizza di sicuranza*. He adds that the *Italians* and *Lombards*, who were spectators of this *Jewish* intrigue, and the instruments employed in conducting it, preserved the forms of these instruments, which they afterwards well knew how to avail themselves of, in conveying out of *Italy* the effects of the *Guelphs*, when driven from thence by the *Gibbelines*.—But this relation, though adopted by so respectable a writer as *Cleirac*, carries with it very little of the air of probability.

Be this as it may, maritime commerce carried to any considerable extent, must necessarily draw after it the contract of insurance, from the desire natural to all men to be protected against the accidents of fortune. The utmost we can do, therefore, towards ascertaining, as nearly as the nature of such an inquiry will admit, about what time this contract came into use, will be to trace the progress of commerce till it attained that height, which rendered insurance necessary to its farther advancement. This inquiry will be facilitated by an account of the various systems of marine law which have been promulgated by the different maritime states of

Europe,

Europe, from time to time, as the advancement of commerce rendered them neceſſary; and by ſhewing about what period laws for the regulation of the contract of inſurance firſt began to make a part of theſe ſyſtems.

If the ancients were unacquainted with this contract, it was becauſe their maritime commerce never attained the degree of greatneſs which rendered its protection neceſſary. Hiſtory affords us no information from which we can form any conjecture, whether it was in uſe among the *Phœnicians*, the *Carthaginians*, or the *Greek* republics. Whether this contract was known to the Ancients.

It is true that each of theſe ſtates did carry on foreign commerce to an extent that would have rendered it a ſubject of inſurance, had this contract been already in uſe among them. But it ſeems extremely probable that their maritime commerce was never of ſufficient magnitude, nor ſufficiently perilous, to oblige them to reſort to inſurance as a means of enabling private adventurers to carry it on.

As to the *Romans*, though the contract of bottomry which is a ſpecies of inſurance, was well underſtood among them, as we ſhall have occaſion to ſhew hereafter, yet there is no mention of inſurance in the *Roman* law; nor is there to be found in any book of that law, or in the *Latin* language, even a name for this contract, the word *aſſecuratio* being a barbariſm adopted in *Italy* about the 12th or 13th century, when inſurance probably firſt came into uſe there; nor does the hiſtory of that people any where afford a well-founded reaſon to believe that this contract was ever in uſe among them. It is true, that though they had no naval power before the firſt *Punic* war, they became maſters of the ſea before the ſecond; and that, after the battle of *Actium*, their maritime ſtrength was conſidered as equal to their dominion on land. But that warlike and ambitious people, during almoſt all the time of their greatneſs, cultivated navigation only with a view to war and conqueſt. Commerce was to them a ſubject of inferior conſideration, which they left to be carried on by the ſlaves and freed-men of the great. To extend their conqueſts and conſolidate their power, was their principal employment, and almoſt

the only object of their care. Finding themſelves maſters of the greateſt part of the then known world, which they had reduced to ſubjection by a ſeries of unparalleled conqueſts, they might eaſily have engroſſed the whole commerce of the nations they had ſubdued. But they diſdained the ſober purſuits of induſtry, the want of which they compenſated by the ſpoils of the conquered provinces.

Beſides, the jealous policy of the *Roman* ſtate, by an ancient law eſtabliſhed by *Clodius* the tribune, in the time of the firſt *Punic* war, and afterwards renewed by the *Julian* law, prohibited ſenaters from building or poſſeſſing ſhips, leſt the power reſulting from this ſpecies of property might render them formidable to the ſtate.

What commerce they carried on was principally, if not wholly, confined to the *Mediterranean*, *Egæan*, and *Euxine* ſeas, which were almoſt ſurrounded by their own dominions, and guarded by the armed fleets of the ſtate, ſo as to remove all apprehenſion of *enemies or pirates*. Their ſmall veſſels rarely ventured out of port but in fine weather, and then only to coaſt along the ſhores, ſeldom venturing out of ſight of land, even in the time of *Auguſtus* (*a*); the mere *perils of the ſea* muſt therefore have been to them very inconſiderable. So that, whether we contemplate the *extent* of the *Roman* maritime commerce, or the *perils* to which it was expoſed, we may reaſonably conclude that it did not ſtand much in need of the protection of inſurance.

Some, however, have fancied that they could diſcover in the *Roman* hiſtory, the firſt traces of this contract.—*Livy* relates, that during the ſecond *Punic* war, certain contractors employed to tranſport ammunition and proviſions to *Spain*, ſtipulated that the republic ſhould indemnify them againſt ſuch loſſes as might be occaſioned by the enemy, or by tempeſts in the courſe of the voyage. "*Impetratum fuit, ut, quæ navibus imponerentur ad exercitum Hiſpanienſem deferenda, ab hoſtium tempeſtatisque vi, publico pericula eſſent* (*b*). Others rely on a paſſage in *Suetonius*, who relates that the emperor *Claudius*,

(*a*) Vid. *Huet*, Commerce des Anciens, ch. 46. ſ. 9, 10, 11.
(*b*) *Liv.* Hiſt. lib. 23. n. 49.

in

in a time of ſcarcity at *Rome*, in order to encourage the importation of corn, took upon himſelf all the loſs or damage that might be occaſioned by ſtorms and tempeſts in its paſſage thither. *Negotiatoribus certa lucra propoſuit, ſuſcepto in ſe damno, ſi quid per tempeſtates accidiſſet, et naves, mercaturæ cauſâ, fabricantibus, magna commoda conſtituit* (*a*). Some years afterwards, contractors, who had been employed to convey proviſions to the armies ſerving in the provinces, were proſecuted for having ſet up pretended ſhipwrecks as a ground of charge, the republic having taken ſuch loſſes upon itſelf: *Publicum periculum erat à vi tempeſtatis, in iis quæ portabantur ad exercitus* (*b*).

But theſe inſtances only ſerve to ſhew, that the contractors were to tranſport the ſtores purchaſed of them to the places of their deſtination, at the riſk of the republic. They have ſcarcely a reſemblance in any one particular to the contract of inſurance, and are to be looked upon merely as a mode of encouraging perſons to ſupply the demands of the public. Upon no better authority, however, than the above paſſage in *Suetonius*, has *Malyne* roundly aſſerted, that *Claudius* had introduced the cuſtom of inſurance, 'whereby', ſays he, 'the danger and adventure of goods is divided, re-parted, and borne by 'many perſons;—to the end that merchants might augment their traffic, and not adventure all in one bottom 'to their loſs and overthrow (*c*).' The ſame author adds, that 'this cuſtom coming to the knowledge of the inhabitants of *Oleron*, was recorded by them, and ſet down 'for a law, to be obſerved by all the ſea-coaſt towns of '*France*.' And yet there is not a word in the laws of *Oleron*, nor in thoſe of *Wiſbuy* or of the *Hans-Towns*, as collected by *Malyne* himſelf, which has the leaſt alluſion to inſurance.

A paſſage in one of *Cicero's* letters is alſo adduced, as a proof that the *Romans* were acquainted with this contract. —Having gained a great victory in *Cilicia*, and obtained conſiderable ſpoils there, he wrote to the *proquæſtor*, or under treaſurer, *Caninius Salluſt*, at *Laodicea*, in theſe words: "*Laodiceæ me prædes accepturum arbitror omnis pe-*

(*a*) *Suet.* ch. 18. (*b*) *Liv.* lib. 25, n. 3. (*c*) Lex merc. 203.

" *cuniæ publicæ, ut et mihi et populo cautum ſit ſine vecturæ* " *periculo* (*a*)." From this *Emerigon* (*b*) would infer an order to the proquæſtor to contract with perſons who ſhould be anſwerable for the riſk of ſending this money by ſea to Rome. But the ſenſe of the paſſage by no means warrants this inference. On the contrary, it ſeems that *Cicero* only meant to acquaint the *proquæſtor*, that he would have the money at *Laodicea*, and there take ſecurity for its being paid at *Rome*, without any riſk, either to himſelf or the republic. If this be the right interpretation of *Cicero's* words, it ſeems, as Mr. *Park* has very properly obſerved (*c*), to bear a much ſtronger alluſion to the idea of remitting the money by means of *bills of exchange*, than to that of inſuring againſt the perils of the ſea.

There is in the pandects, an obſervation of *Ulpian*, which affords greater colour for ſuppoſing that the contract of inſurance was not altogether unknown to the *Romans*, than any of the paſſages above referred to. He ſays, " *Illa ſtipulatio, decem millia ſalva fore promittis?* " *valet* (*d*)." This paſſage ſhews, however, that the contract alluded to, whatever it might have been, was very little known at the time *Ulpian* wrote, ſince he thought it neceſſary to obſerve that *it was not illegal.*

Growth of maritime Commerce.

As maritime commerce, when carried to a certain extent, muſt, as has been already obſerved, draw after it the contract of inſurance; and as the growth of the one muſt neceſſarily induce a correſponding improvement in the principles of the other, we will here take a curſory view of the progreſs of commerce from its revival in *Europe* in the 12th century, to the period of its attaining its preſent greatneſs.

The cauſes which contributed to its revival.

During the dark ages which ſucceeded the fall of the *Roman* empire, down to the twelfth century, all was *Gothic* barbariſm in the weſt of *Europe*. Science, literature, commerce, were things unknown or wholly neglected. Many cauſes at length contributed to revive the

(*a*) *Cic.* Ad Fam. 2. 17. (*b*) Pref. 4. (*c*) Introd. 20. (*d*) Dig. l. 45, de verb. oblig.

ſpirit

ſpirit of commerce, and renew the intercourſe between nations.

The cruſades, about the cloſe of the eleventh century, opened a vaſt communication between *Europe* and the *Eaſt*. *Conſtantinople*, the capital of the *Eaſtern* or *Greek* empire, had eſcaped the ravages of the northern barbarians who had overthrown that of the *Weſt*. It was ſtill a great and commercial city, where the elegances of poliſhed life yet remained; and this became the place of general rendezvous for the chriſtian armies on their way to *Paleſtine*, or on their return from thence. And though the object of theſe expeditions was conqueſt, and not commerce, and though the iſſue of them proved unfortunate to theſe romantic and infatuated warriors, their commercial effects were beneficial and permanent. The cruſaders brought back with them a taſte for the refinements and luxuries of the *Eaſt*; and this ſoon created a demand, which could only be ſupplied by an extenſive commerce with thoſe parts. The cruſades.

The cloſe of the holy war was followed by the invention of the mariner's compaſs, or at leaſt its introduction into *Europe*, about the year 1260. This, with the conſequent improvements in navigation, opened a wide field for maritime enterprize. Diſcovery of the mariner's compaſs.

The feudal ſyſtem which had been eſtabliſhed in all the weſtern parts of *Europe* by the northern conquerors, had, about this time, attained its greateſt height, and the overgrown power of the nobles, its natural concomitant, while it held the great body of the people in ſlavery, controuled, or gave law, even to the ſovereign himſelf. To create ſome power that might counterbalance that of theſe potent vaſſals, it became the policy of the monarchs of *Europe* to erect communities or corporations in the conſiderable towns, with excluſive juriſdiction, and privileges which might protect the inhahitants from ſervitude, or dependance upon the neighbouring barons, or any other than the ſovereign himſelf. This expedient was firſt adopted by *Lewis the Groſs*, about the beginning of the 12th century; and though an ancient *French* author calls it a new and wicked device to procure liberty to ſlaves, and encourage them to ſhake off the dominion of their The erecting of corporations.

their maſters (*a*), yet the effects of this meaſure ſoon juſtified the policy by which it was dictated. The towns became the aſylum of the oppreſſed, the acquiſition of liberty produced a ſpirit of induſtry; and commerce ſoon began to eſtabliſh an intercourſe between different nations.

Commerce of the *Lombards.*

The free ſtates of *Italy*, which aroſe out of the ruins of the weſtern empire, ſought, by the arts of peace, to raiſe themſelves to that eminence which others had obtained by arms and conqueſt. During the 12th and 13th centuries, the commerce of *Europe* was almoſt entirely in the hands of theſe *Italians*, more generally known in thoſe ages by the name of *Lombards*, of whom companies or factories ſettled themſelves in almoſt every ſtate in *Europe*, where they became the only conſiderable merchants and bankers, and in thoſe times rivalled even the *Jews* themſelves in the arts of uſury. One of theſe companies ſettled in *London*, from whom *Lombard-ſtreet*, in that capital, took its name. The rival republics of *Venice* and *Genoa*, at this time, took the lead in commercial adventure. They brought the rich productions of *India* at firſt by a northern circuit, through the *Caſpian Sea* to *Aſtracan*, and from thence by the *Black Sea* to *Europe*. The *Venetians* afterwards, having obtained permiſſion from the *Pope* to trade with the infidels, and from the *Calif* of *Egypt*, the liberty of trading on the coaſts of *Egypt* and *Aſſyria*, opened a more direct communication with *India*, the trade of which they now wholly engroſſed, and continued the moſt powerful maritime ſtate in *Europe*, till the *Portugueſe* doubled the *Cape of Good Hope* in 1497, and eſtabliſhed an uninterrupted communication by ſea, between *Europe* and the *Eaſt Indies* (*b*).

Inſurance ſuppoſed to have been firſt brought into uſe in *Italy.*

As the maritime commerce of theſe *Italian* ſtates appears to have been carried to a very conſiderable extent about the end of the 13th century, it is extremely probable that inſurance came into uſe in *Italy* about that time. From thence, after the advantages attending it came to be underſtood, it was tranſplanted into moſt of the countries where the *Lombards* had eſtabliſhed their trading companies. According to *Malyne* (*c*), they introduced it into *England* ſomewhat earlier than into the neighbour-

(*a*) Vid. *Hume* Hiſt. vol. 2. p. 118. (*b*) *Anet*, Commerce des anciens, ch. 48. ſ. 13. p. 311. (*c*) Lex merc. 105.

ing

ing countries on the continent; and, as a proof of this, he ſays, that even *Antwerp*, in its meridian glory, borrowed inſurance from *England*, and that down to the time in which he wrote (1622), there was in every policy made at *Antwerp*, and other places in the *Low Countries*, a clauſe inſerted, that it ſhould be in all things the ſame as policies made in *Lombard-ſtreet*, in the city of *London*, the place where the *Lombards* are known to have firſt ſettled, and carried on their commerce in *England*, and where the merchants of *London* uſed to hold their meetings before the *Royal Exchange* was built.

When into *England*.

Anderſon (*a*) ſays, that the vaſt commerce carried on about the middle of the 16th century, between *England* and the *Netherlands*, introduced the practice of inſuring from loſſes by ſea, by a joint contribution. But the preamble to the ſtat. 43 Eliz. c. 12, which was paſſed in 1601, diſtinctly ſtates, that it had been an *immemorial uſage* among merchants, both *Engliſh* and foreign, when they made any great adventure, to procure inſurance to be made on their ſhips or goods adventured. From this it may reaſonably be ſuppoſed, that inſurance muſt have been in uſe in *England* long before the middle of the preceding century.

Commerce of the *Hanſeatic* League.

But while the *Lombards* were ſucceſsfully cultivating their commerce in the ſouth of *Europe*, the ſame ſpirit began to manifeſt itſelf in the north; and about the middle of the 13th century, the cities of *Lubec* and *Hamburgh* opened a trade with the *Lombards*. Theſe, however, were ſoon obliged to enter into a league of mutual defence againſt the piracies of the *Danes*, *Swedes*, and other barbarous nations ſurrounding the *Baltic*. The benefits reſulting from this confederacy, ſoon induced other towns to ſolicit to be admitted into it; and in a ſhort time, eighty of the moſt conſiderable cities of *Germany* and the *Netherlands* were received into this alliance, which took the name of the *Hanſeatic League*. They ſupplied the reſt of *Europe* with naval ſtores, and eſtabliſhed in ſeveral towns a ſtaple, in which their commerce was regularly carried on, under the protection of this powerful confederacy. *Bruges*, in *Flanders*, was the moſt conſiderable of theſe. It

Commerce of the *Flemings*.

(*a*) Hiſt. com. vol. 2, p. 108.

be-

became the center of communication between the *Lombards* and the *Hanſeatic* merchants, and the great emporium for the merchandize of the *Eaſt* and *Weſt*. The *Flemings* traded with both in that city. This infuſed into them a habit of induſtry, which, while they retained their ancient free inſtitutions, rendered *Flanders* the moſt opulent, the moſt populous, and the beſt cultivated country in *Europe*.

Meaſures of *Edward* III. to introduce the woollen manufacture into *England*.

Edward III., upon his going into *Flanders*, preparatory to his firſt invaſion of *France*, about the year 1340, was ſtruck with the flouriſhing ſtate of theſe provinces, of which he ſoon diſcovered the true cauſe, and endeavoured to excite a ſimilar ſpirit of induſtry among his own ſubjects, who, blind to the advantages of their ſituation, and ignorant of the ſource from which opulence was deſtined one day to flow into their country, neglected his wiſe admonitions; nor would they even attempt thoſe manufactures, the materials of which they furniſhed to theſe foreigners. The King, however, encouraged *Flemiſh* artizans to ſettle in his dominions; and cauſed many wiſe laws to be made for the encouragement and regulation of trade, particularly the ſtat. 11 *Ed.* 3, c. 2, by which all perſons were prohibited from wearing any woollen cloth but of *Engliſh* fabric. By this he gave a beginning to the woollen manufactures of *England*, and firſt turned the active and enterpriſing genius of his people to thoſe arts which have raiſed this country to the firſt rank among commercial nations.

Petition againſt the *Lombards*.

The *Lombards*, however, ſtill engroſſed the whole of the carrying trade with *England*. Some attempts were made by parliament, in the reigns of *Edward* III. and *Richard* II. to encourage *Engliſh* ſhipping, but without effect; for we find, that in the 18th year of *Henry* VI. the commons petitioned, that no *Italian*, or other merchants, of the countries beyond the ſtreights of *Gibraltar*, ſhould ſell here any other merchandize than that of the countries beyond thoſe ſtreights. And the reaſon aſſigned for the regulation thus prayed, was, that the *Italians* had become the carriers, not only of the commodities brought from the countries within the ſtreights, but alſo of thoſe from the countries without the ſtreights, which

which were not brought in ſuch abundance, nor ſold ſo cheap, as when they were brought by the merchants of the countries from which they came. They prayed, therefore, that this might paſs into a law for ten years; but the King did not conſent to it (*a*). At length, however, by ſtat. 1 *Rich.* 3, c. 9, great reſtraints were laid, both upon theſe *Italian* merchants, and their commerce.

Their commerce reſtrained in *England*.

But, beſide the diſadvantage of having almoſt all the foreign commerce of *England* carried on by ſtrangers, even the internal trade of the country was continually checked in its growth, or wholly reſtrained by the rapacity and bad policy of the government, either by enormous and arbitrary impoſitions, or by grants of monopolies, which for ages operated as a conſtant diſcouragement to induſtry and ingenuity, till by the ſtat. 21 *J.* 1, c. 3, they were declared to be *contrary to the ancient and fundamental laws of the realm.*

Engliſh trade checked by impoſitions and monopolies.

It may be recollected alſo, that *England*, from the time of the conqueſt, down to the time of *Henry* VII., was almoſt conſtantly engaged in foreign or domeſtic wars. The arts of peace were, during that time, exiled, as it were, from this country, and ſo remained, until they found in the comparative tranquillity of the reign of that cautious prince, a degree of protection, under which they began to acquire ſome portion of ſtrength and ſtability.

Two great events alſo, which happened in this reign, gave to the reviving ſpirit of commerce, a new and extraordinary impulſe. While the *Portugueſe* were creeping along the coaſt of *Africa*, and ſlowly and cautiouſly exploring a paſſage by ſea to *India* by the eaſt, *Columbus* conceived the project of ſailing thither by the weſt, and in the attempt, diſcovered the *Weſt Indies*, and the vaſt continent of *America*, in the year 1492. The *Portugueſe* ſtill perſevered, and, in the year 1497, atchieved their great deſign. *Vaſques de Gama* doubled the *Cape of Good Hope*, and opened a paſſage by ſea to *India*, *China*, and *Japan*. *Europe* now emerged out of that darkneſs in which ſhe had been involved from the ſubverſion of the *Roman* empire. The arts awoke from a ſlumber of 12 centuries.

Diſcovery of *America* and the paſſage by ſea to the *Eaſt Indies*.

(*a*) Vid. *Reeves's* hiſt. of ſhipping, p. 12. 15.

So

So vaſt a field for foreign diſcovery and commercial enterpriſe was now opened to the view of the maritime ſtates of *Europe*, that the thirſt of military glory, ſo long predominant, ſoon gave place to the avidity of wealth, and a paſſion for adventure in the newly diſcovered regions. Colonization followed, and the *Engliſh* ſoon formed valuable ſettlements in the *Eaſt* and *Weſt Indies*, and on the continent of *America*.

Flemiſh commerce ruined by *Philip* II.

The *Flemings*, however, ſtill retaining their ancient free inſtitutions, were yet the firſt commercial people in *Europe*. Their induſtry, their manufactures, their foreign trade, ſtill ſecured to them a high degree of wealth and proſperity, when all was overthrown by the bigotry and tyranny of *Philip* II. Many of the perſecuted fugitives forſook their country and joined their fellow ſufferers in the *Batavian* moraſſes, and with them, under the illuſtrious heroes of the houſe of *Orange*, bravely vindicated their liberties, and finally triumphed over their oppreſſors.

Tranſferred to *England* and *Holland*.

Many alſo ſought an aſylum in *England*, encouraged and protected by the wiſe and beneficient policy of *Elizabeth*. To both countries they carried their induſtry and their uſeful arts; and thus was laid the moſt ſolid foundation of that commercial greatneſs and maritime ſtrength to which *England* and *Holland* afterwards attained; and which, in this kingdom, has ſince been carried to a height unparalleled in the hiſtory of mankind.

Marine law.

The growth of maritime commerce in *Europe*, of which I have rapidly traced the progreſs, muſt have been accompanied by a correſponding improvement in marine law. Several codes were formed by different ſtates; at firſt for the regulation of navigation, and for defining the authority of the maſters and other officers of ſhips, and the duty and rights of the ſeamen; afterwards for the regulation of maritime contracts.

Rhodian law.

The earlieſt ſyſtem of marine law, of which we find any account in hiſtory, was that compiled by the *Rhodians*, after they had, by their commerce and naval victories, obtained the ſovereignty of the ſea, about 900 years be-

fore the chriſtian æra. *Cicero*, in his oration in favour of the *Manilian* law, ſays of that people, "*Rhodiorum uſque ad noſtram memoriam diſciplina navalis et gloria remanſit.*"

Whether their maritime code merited equal applauſe, we are now unable to determine, becauſe there is reaſon to ſuppoſe that it has not been tranſmitted down to us; not at leaſt in a perfect ſtate. A collection of marine inſtitutions, under the denomination of *Rhodian* laws, may be ſeen in *Vinnius*; but they bear evident marks of a ſpurious origin (*a*). Some have ſuppoſed, that the *Rhodian* laws were adopted by the *Romans* during the firſt *Punic* war, when they firſt became a naval power. Others affirm, that they were incorporated with the *Roman* law, by *Juſtinian* and others (*b*). Perhaps the more probable conjecture is, that different parts of theſe laws were, from time to time, adopted by that people, as the neceſſities of their marine required.

As to the *Phœnicians*, the *Carthaginians*, the *Athenians*, the *Corinthians*, and other maritime ſtates of antiquity, whether they had marine laws of their own inſtitution, no where appears. If any ſuch ever exiſted, they have not deſcended to our times.

The firſt code of modern ſea-laws was compiled about the time of the firſt cruſade, towards the end of the eleventh century, by the people of *Amalphi*, who had then become conſiderable for their commerce and maritime power. It is not improbable, that this code conſiſted principally of the *Rhodian* inſtitutions, which were found ſtill in force in the countries bordering upon the *Mediterranean*; and being collected into one regular ſyſtem, were, for a conſiderable time, generally received as law in thoſe countries. *Amalphitan code.*

But other ſtates, as they grew into eminence, formed new collections of marine law, in which the old inſtitutions were altered and modified to ſuit the improvements of the times, or their own particular intereſts. Great inconvenience was ſoon found to ariſe from this diverſity of rules upon a ſubject that had long been regulated by one general ſyſtem, which was looked upon as part of the *Conſolato del mare.*

(*a*) Vid. *Emerig.* Pref. 3. (*b*) Vid. *Selden* de dominio maris, l. 1. c. 10. *Vinnius* in Peckium 190.

law

law of nations. This made it neceſſary for the different maritime ſtates to form a new code out of all theſe diſcordant materials; which was done, as *Grotius* informs us (*a*), by the authority of almoſt all the ſovereigns of *Europe*. This new digeſt was denominated *Conſolato del mare*. It was originally publiſhed by order of the ancient kings of *Aragon*, in the *Catalan* tongue, and therefore probably compoſed at *Barcelona*, the capital of that province, and of the kingdom of *Aragon*. In the thirteenth century, this code was received as law in *Italy*, the *Greek* empire, *France* and *Germany* (*b*); and *Vinnius* ſays, that moſt of the marine laws in *Spain*, *Italy*, *France*, and *England*, are borrowed from it (*c*). *Cuſarigis* ſays of it, *Conſulatus maris, in materiis maritimis, tanquam univerſalis conſuetudo habens vim legis inviolabiliter attenda eſt apud omnes provincias et nationes* (*d*). So that it ſeems to be conſidered as a branch of the public law; and though not quite unexceptionable in ſome reſpects, its regulations are ſtill of very high authority in every maritime ſtate in *Europe*.

Laws of *Oleron*. The collection of ſea-laws, next in point of time, as well as of celebrity, is that of *Oleron*, which, according to the *French* writers, were digeſted in the iſland of that name, under the title of *Roole des jugemens d'Oleron*, by direction of Queen *Eleanor*, the wife of *Henry* II., in her quality of ducheſs of *Guienne*, and afterwards enlarged and improved by her ſon *Richard* I. (*e*). But *Selden* denies this, and maintains that theſe laws were compiled and promulgated by *Richard* I., as King of *England* (*f*.) Theſe laws are inſerted in the beginning of the book, entitled *Us et coutumes de la mer*, with a very excellent commentary on each ſection by *Cleirac*, the learned editor.

Laws of *Wiſbuy*. The next collection which occurs in *Cleirac*, is that of the ordinances made by *the merchants and maſters of the magnificent city of Wiſbuy*, in the iſland of *Gothland*, anciently much celebrated for its commerce, now an obſcure and inconſiderable town. The true date of the promulgation of this code is not certainly known. *Malyne* (*g*) ſays,

(*a*) *Grot.* De jure bel. lib. 3, c. 1. ſ. 5, n. 6. (*b*) *Emerig.* Pref. 6.
(*c*) *Vinnius* Leg. Rhod. p. 190. (*d*) *Cuſarigis*, Diſc. 213. n. 12.
(*e*) *Cleirac*, p. 2, *Emerig.* pref. p. 11. (*f*) *Selden* de dominio maris, c. 24.
(*g*) Collection of Sea laws, p. 44.

that

See page 17 to 20
2 leaves further on.

to regulate it, than in any other country; and hence the practice of it with us has been found moſt conformable to the general uſage of trade. Some few ſtatutes have paſſed, from time to time, to reſtrain the abuſes of inſurance, but not one has yet been made, either to aſcertain any old principle, or to ſanction any new one. This may be accounted for, not by ſuppoſing, with a learned writer on the law of inſurances, that this law was already well ſettled, and its principles underſtood in moſt of the neighbouring commercial countries, before the uſe of it became extenſive in *England* (*a*); but becauſe the law of merchants is conſidered as a branch of the common law (*b*), and therefore the cuſtom of merchants, in any one particular, being once clearly aſcertained in any of the ſupreme courts, acquires from thenceforth the force of law, without the ſanction of any higher authority. It would therefore have been an uſeleſs labour for the legiſlature to enact thoſe very uſages, by poſitive law, which are already conſidered as part of the law of the land. Beſides, what is or is not the cuſtom of merchants is much better aſcertained in the inveſtigation of particular caſes, in courts of juſtice, than it could be by parliament, with all the information and aſſiſtance it could obtain.

Magens, indeed, wonders that the legiſlature had not laid down ſome complete ſyſtem of regulations concerning inſurances; and yet he acknowledges, "that whenever a trial at law takes place between an inſured and an inſurer, the wiſdom and impartiality of the judges, in ſumming up the evidence, and directing the jury, leaves no room to doubt that the verdict will be according to right and equity (*c*)." Still, however, he ſeems to have conceived a ſtrong deſire to have a grand ſyſtem of marine juriſprudence erected in this country, and it is probable that he meant himſelf to have been the principal architect. But he appears to have been unable to engage thoſe at the head of the government to enter into his views, and he peeviſhly tells us, that "it ſeems to be the common maxim of thoſe who ſit at the helm in theſe kingdoms, when things are not very urgent, to leave merchants to agree among them-

(*a*) Vid. *Millar* on Inſur. p. 12.—(*b*) *Winch.* 24.—(*c*) *Magens*, Pref

ſelves, and work on." A perſon leſs fond of erecting new ſyſtems might ſay, perhaps, that he could not have given a better proof of their wiſdom.

Foreign treatiſes. 2. As to *treatiſes*, the earlieſt now extant on the ſubject of inſurance is that entitled *Le Guidon de la mer*, which is found in the collection of marine inſtitutions, publiſhed at *Rouen*, in 1671, by *Cleirac*, under the title of *Les us et coutumes de la mer.* This work is evidently the production of a much earlier period than that of its publication by *Cleirac*; and yet its contents plainly ſhew that it could not have been written till after the practice of inſurance had become pretty general, and moſt of its principles well underſtood. We may therefore reaſonably conclude that it was written about the 15th century. *Cleirac* informs us, "that it was originally compoſed for the uſe of the merchants of *Rouen*, and is ſo complete in itſelf, that it fully explains all that it is neceſſary to know on the ſubject of marine contracts and naval commerce; and that nothing is wanting to it but the author's name." Many faults which had crept into it, through time, and the careleſsneſs of copiers, have been corrected by the editor, who has enriched the whole by a very learned and excellent commentary of his own.

Le Guidon.

Cleirac.

Valin. *France* has, in more modern times, produced three very valuable treatiſes on the ſubject of inſurances. *Valin's* commentary on the ordinance of the marine is of the higheſt value upon every topic of marine law. On the branch which relates to inſurance, his commentary is clear, acute, and inſtructive. *Pothier*, in his treatiſe on contracts, unites the moſt profound learning with the pureſt morals and the moſt comprehenſive judgment. That upon inſurance, is neat, conciſe, and maſterly. *Emerigon*, whoſe treatiſe is confined to the ſubject of inſurance, unites great learning with great practical knowledge. His book is, of all the foreign publications on this ſubject, the moſt uſeful to an *Engliſh* lawyer.

Pothier.

Many other publications on this ſubject have appeared in different countries, and in different languages, the moſt conſiderable of which are *Roccus*, *Caſaregis*, *Locennius*, *Bynkerſhoek*, and *Santerna.* To theſe we ſhall have frequent occaſion to refer in the courſe of the preſent work.

It

It is not a little ſingular, that in *England*, where the practice of inſurance has been more extenſive than in any other country, ſo little was publiſhed on this important ſubject, till within the laſt twenty years. *Malyne*, *Molloy*, *Beawes*, *Poſtlethwaite*, and ſome others leſs worthy of notice, have each in their reſpective publications, given a ſhort chapter or two on the ſubject of inſurances. Mr. *Magens*, a merchant, in 1755, republiſhed in two volumes quarto, his *Eſſay on Inſurances*, which he had before publiſhed in *German* at *Hamburgh*. The eſſay itſelf occupies but a ſmall portion of the firſt volume. It ſhews, however, a conſiderable degree of practical knowledge of inſurances, derived from the ordinances, of different countries: but the book would have been much more valuable had the author been better acquainted with the general treatiſes on this ſubject. The reſt of the work conſiſts of a number of calculations of averages, of letters and ſtate papers relating to commerce, a collection of marine and commercial ordinances, treaties of commerce, and other matters, which are often of great utility. Mr. *Weſket*, a merchant, has, in a ſort of alphabetical arrangement, put together a large quantity of materials on the ſubject of inſurances, and of a variety of other matters little connected with inſurance. Mr. *Millar*, a learned advocate of the *Scotch* bar, publiſhed at *Edinburgh*, in 1787, the *Elements of the law relating to inſurances*, in which he diſcovers great knowledge of his ſubject, derived both from foreign and *Engliſh* books. To Mr. *Park*, the profeſſion of the law and the commercial world are much indebted for his *Syſtem of the law of inſurances*; a book ſo generally known that it will be unneceſſary for me to ſay more of it upon the preſent occaſion. *Engliſh* authors.

3. With reſpect to *judicial deciſions*, none are conſidered as binding authorities in our ſuperior courts, but ſuch as have been there determined, and even theſe may be re-conſidered; and if, upon a full examination, they are found to militate againſt any clear and indiſputable principle of law, they may, as in other caſes, be overruled. As to foreign deciſions, though they are of no authority in our courts, yet ſome few will be found cited in this work, in order to ſhew, upon doubtful points, how learned men in other countries have Judicial deciſions.

have underſtood the principles of that law, which is ſuppoſed to be in force in this. *Valet pro ratione, non pro introducto jure.*

When actions on policies were firſt brought in the courts of *Weſtminſter.*

Though foreign commerce increaſed conſiderably in the reign of Queen *Elizabeth*, and inſurance probably increaſed in a like degree, yet it appears to have furniſhed but few ſubjects of litigation in the courts of *Weſtminſter*, till towards the cloſe of that reign. The firſt caſe upon inſurance which we find in any book of reports is mentioned by Sir *Edward Coke* (*a*), and he notices it as a mere novelty.—It appears to have been an action brought in the 30th year of Queen *Elizabeth*, on a policy on a ſhip, from *Melcombe Regis* to *Abbeville*. The loſs alledged was by detention of the King of *France* in the river *Soane*. After a verdict for the plaintiff, the defendant moved in arreſt of judgment, on the ground that the fact in iſſue, namely, the detention, aroſe out of the realm, and therefore could not be tried in *London*. But it was reſolved by the court, that the promiſe, which was the ground of the action being made in *London*, the cauſe might be tried there; and that the detention, which was the fact in iſſue, was not the ground of the action, but a breach of the aſſumpſit.

The reaſon why ſo few actions at common law were brought on policies of inſurance before the above period, is very diſtinctly ſet forth in the preamble to the ſtat. 43 *Eliz.* c. 12, which recites, that 'Whereas heretofore aſ-'ſurers have uſed to ſtand ſo juſtly on their credits, that 'few or no controverſies have ariſen thereupon; and if 'any have grown, the ſame have, from time to time, 'been ended and ordered by certain grave and diſcreet 'merchants, appointed by the Lord Mayor of *London*, as 'men, by reaſon of their experience, fitteſt to underſtand, 'and ſpeedily to decide, thoſe cauſes.'—It further recites, 'that *of late years*, divers perſons have withdrawn them-'ſelves from that arbitrary courſe, and have ſought to 'draw the parties aſſured, to ſeek their monies of every 'ſeveral aſſurer, by ſuits commenced in her Majeſty's 'courts, to their great charges and delays.'

Ancient mode of ſettling diſputes.

From this recital it appears that, before the paſſing of that act, almoſt all diſputes ariſing upon contracts of in-

(*a*) 6 Rep. 47, b

ſurance,

See pages 25 a 28
4 leaves further on

that the laws of *Oleron* were tranſlated into *Dutch* by the people of *Wiſbuy*, for the uſe of the *Dutch* coaſt. By *Dutch* I preſume is to be here underſtood *German*; and it cannot be denied that many of the regulations contained in the laws of *Wiſbuy*, are preciſely the ſame as thoſe of *Oleron*. The northern writers pretend, however, that they are more ancient than the laws of *Oleron*, or even the *Conſolato del mare*. *Cleirac* treats this notion with great contempt, and declares that, at the time of the promulgation of the laws of *Oleron* in 1266, which was many years after they were compiled, the *magnificent city of Wiſbuy* had not yet acquired the denomination of a town (*a*). Be this as it may, theſe laws were for ſome ages, and indeed ſtill remain, in great authority in the northern parts of *Europe*. '*Lex Rhodia navalis*', ſays *Grotius*, '*pro jure gen-*' *tium, in illo mari Mediterraneo vigebat; ſicut apud Gal-*' *liam leges Oleronis, et apud omnes tranſrhenanos, leges Wiſ-*' *buenſes*' (*b*).

With reſpect to inſurance, though it is purely a maritime contract, and would naturally find a place in the marine code of every country where it is in uſe; yet not the leaſt mention of it is found, either in the *conſolato del mare*, or in the laws of *Oleron*. In the laws of *Wiſbuy*, indeed, according to *Cleirac*'s verſion (*c*), are theſe words,——

'*Si le maiſtre eſt contraint de bailler caution au bourgeois* '*pour le navire, le bourgeois ſera pareillement tenu bailler cau-*' *tion pour la vie du maiſtre.*

'*C'eſt à dire que, contre les hazards de la mer et de la mort,* '*il ne peut echoir de requiſition raiſonnable à bailler caution; re-*' *gulierement le bourgeois doit riſquer ſon bien, et le maiſtre ſa* '*liberté et ſa vie, bien y puet eſtre fait poliſſe d'aſſeurance.*'

But this laſt paragraph, which alone alludes to inſurance, ſeems to be only a comment upon, or expoſition of, the foregoing, rather than a part of the original text; and its not being contained in *Malyne's* tranſlation of the laws of *Wiſbuy*, ſtrengthens this remark.

Ordinances of the *Hanſeatic League.*

In 1597, the deputies of the *Hanſeatic League*, in a general aſſembly at *Lubeck*, drew up a ſyſtem of laws relating to navigation, for the uſe of their confederacy, to

(*a*) *Cleirac*, p. 3. —— (*b*) *Grotius* de jur. bel. lib. 2, c. 3.
(*c*) Art. 66.

which, in 1614, in an aſſembly at the ſame place, they added ſeveral new ordinances. In theſe regulations, though the contract of bottomry is mentioned, there is not a word on the ſubject of inſurance.

Ordinance of *Louis* 14.

But the completeſt and moſt comprehenſive ſyſtem of this kind, is the famous ordinance of the marine, of *Louis XIV.*, publiſhed in 1681. This excellent code was compiled and arranged by a very maſterly hand, under the inſpection of *Colbert*, the celebrated miniſter of that prince, upon an attentive reviſion of all the ancient ſea-laws of *France* and other countries, with the aſſiſtance of the moſt learned men of the time, and upon conſultation with the different parliaments, the courts of admiralty, and the chambers of commerce in *France*. It forms a ſyſtem of whatever experience and the wiſdom of ages had pronounced to be moſt juſt and convenient in the marine inſtitutions of the maritime ſtates of *Europe*. And though it contains many new regulations, ſuggeſted by motives of national intereſt, yet it has hitherto been eſteemed a code of great authority upon all queſtions of maritime law. Lord *Mansfield*, who appears to have taken much pains to obtain the beſt information, and to poſſeſs himſelf of the ſoundeſt principles of marine law, and of the law of inſurance, ſeems to have drawn much of his knowledge upon theſe ſubjects from this ordinance, and from the elaborate and uſeful commentary of *Valin*. This may be perceived in many of his judgments upon queſtions of inſurance, though his lordſhip does not always think it neceſſary to cite his authority.

Law of Inſurance.

The law of inſurance is conſidered as a branch of marine law, and was borrowed by us from the *Lombards*, who firſt introduced the uſe of this contract into *England*. It is alſo a branch of the law of merchants, being found in the practice of merchants, which is nearly the ſame in all the countries where insurance is in uſe; and, indeed, merchants themſelves were, for a long time, the only expounders of it. The law of merchants not being founded in the particular inſtitutions, or local cuſtoms of any particular country, but conſiſting

Law of Merchants.

of

of certain principles which general convenience has eſtabliſhed to regulate the dealings of merchants with each other in all countries, may be conſidered as a branch of public-law. *Non erit alia lex Romæ, alia Athenis, alia nunc, alia poſt hac; ſed et omnes gentes, et omni tempore una eademque lex obtinebat (a).*

Particular uſages.

Beſide the general law of merchants, there are certain uſages which prevail in particular countries, and ſometimes in particular branches of commerce. Theſe, like local cuſtoms in *England*, have the force of law where they prevail; and where they are in force, are always ſuppoſed to be in the contemplation of the parties; and the contract of inſurance is conſtrued as having been made with reference to them. But then they muſt appear to have been long eſtabliſhed; that is, as I humbly apprehend, they muſt be immemorial, or at leaſt coeval with the branch of commerce to which they belong *(b)*. They muſt alſo be reaſonable and legal; otherwiſe no notice can be taken of them in any court of juſtice.

If it be aſked where the law of inſurance is to be found; the anſwer is, in the marine law, and in the cuſtom of merchants, which may be collected, 1. From the ordinances of different commercial ſtates; 2. From the treatiſes of learned authors on the ſubject of inſurance; 3. From judicial deciſions in this country, and others profeſſing to follow the general marine law and the law of merchants.

Ordinances relating to inſurance.

1. *Particular ordinances* have, as we have already ſeen, been made in many countries upon the ſubject of marine law; and many have been made to regulate marine inſurances. But theſe have ſeldom gone farther than to define, and to ſanction by legiſlative authority, thoſe principles which were already received as law in all commercial countries. Some, indeed, have added regulations, dictated only by national or particular intereſt; but theſe are wholly diſregarded elſewhere.

The ordinances of other countries are not, it is true, in *force* in *England*; but they are of *authority*, at leaſt as expreſſing the uſage of other countries upon a contract

(*a*) *Cic. Off.* 3.—(*b*) But ſee *Noble* v. *Kennoway*, *Doug.* 492 poſt ch. 6. ſ. 5.

which is governed by general rules, which are underſtood to form a branch of public law. *Non habent vim legis, ſed rationis.*

Of *Barcelona.* The earlieſt ordinance now extant on the ſubject of inſurances, is that of *Barcelona*, which, though without a date, yet from circumſtances diſcloſed in it, muſt have been publiſhed about the year 1435. *Emerigon* fixes the period of its publication in 1484 *(a)*. But this cannot be correct; for after the crowns of *Aragon* and *Caſtile* were united by the marriage of *Ferdinand* and *Iſabella* in 1465, *Catalonia*, of which *Barcelona* is the capital, became ſubject to the laws of the united kingdom, and from that time no laws were promulgated as from that city.—It appears that this was not the firſt ordinance publiſhed on this ſubject; for it recites, that '*whereas in times paſt but few ordinances of inſurance have been made, this defect requires amendment*, &c.'

Of *Florence.* The next ordinance on this ſubject was publiſhed at *Florence* in the year 1523, after that city had been raiſed to a high degree of commercial greatneſs by the wiſdom and abilities of the family of *Medicis*.

Of *Charles V.* and *Philip II.* The Emperor *Charles V.* in 1551, publiſhed a number of regulations concerning maritime commerce, called the *Caroline* code, to which his ſon *Philip II.* added ſeveral new ordinances in 1563 and 1565.

Beſide theſe, ſeveral other ſtates, and even particular cities, in more modern times, have promulgated their reſpective codes of marine law, and regulations of inſurance. Moſt of theſe will be found collected in the ſecond volume of *Magens*, to which, in the following work we ſhall have frequent occaſions to refer. But in the celebrated ordinance of the marine of *Louis XIV.* above alluded to, will be found the beſt and moſt complete ſyſtem of *poſitive law* for the regulation of inſurances, that has yet appeared in any country. Still, however, it muſt be obſerved, that many of the regulations contained in this ordinance were dictated by national intereſt, and are contrary to the general law upon the ſubject.

Of *England.* In *England*, where the practice of inſurance has been the moſt extenſive, fewer poſitive laws have been made

(*a*) *Emerig.* Preſ. 12.

to

See page 21 to 24 4 leaves back.

and from the information of intelligent merchants, he drew thoſe leading principles, which may be conſidered as the common law of the ſea, and the common law of merchants, which he found prevailing throughout the commercial world, and to which almoſt every queſtion of inſurance was eaſily referable. Hence the great celebrity of his judgments upon ſuch queſtions, and hence the reſpect they commanded in foreign countries (*a*).

Many great and important queſtions on the law of inſurance have occurred ſince Lord *Mansfield*'s time, the deciſion of which proves that neither the learning or the talents of the judges of *Weſtminſter Hall*, have been diminiſhed ſince he retired from it. Nothing, indeed, in the hiſtory of the preſent reign, affords a ſtronger proof of his Majeſty's paternal regard for the welfare and happineſs of his people, and of his care of public morals, than the choice of the perſons who have been appointed to fill the high judicial offices in the courts of *Weſtminſter*.

(*a*) Of this there cannot be a better proof than the following:—*Emerigon*, though not altogether free from national prejudices, after giving an account of the deciſion of the court of King's Bench, in the caſe of *Lavabre* v. *Walter*, concludes with theſe words;—On ne ſauroit s'empêcher d'admirer cette maniere de procéder, quelque éloignée qu'elle ſoit de nos mœurs; car l'impreſſion que fait la vertu ſur nous eſt ſi forte, que nous l'aimons juſques dans nos ennemis mêmes. (Ceci etoit écrit en 1781.)—*Tanta vis probitatis eſt, ut eam in hoſte etiam, diligamus. Cic. de amicitia*, c. 9. Les juges en Angleterre ne croient pas, que ſe ſoit aſſez de bien faire; ils donnent les motifs de leur deciſion, afin qu'on ſache qu'on eſt ſoumis à l'empire de la loi, plutot qu à l'autorité de l'homme. *Emerig.* vol. 2, p. 67.

CHAP.

CHAP. II.

Of the Parties to the Contract.

THE parties to the contract of insurance are the insured and the insurer: It will be the business of the present chapter to enquire,

1. What persons may be insured;
2. What persons may be insurers.

Sect. 1.

What Persons may be insured.

Vid. c. 3. s. 3.

IN this country, all persons, whether *British* subjects or aliens, may, in general, be insured. The principal, if not the only exception to this rule is, the case of an alien enemy.

Whether an alien enemy may be insured.

It was long a disputed question, whether, in point of *policy*, the insurance of the property of the enemies of the state, in time of war, ought to be tolerated in this country. This question has, more than once, been agitated in Parliament. In the year 1741, a bill was brought into the House of Commons to prohibit insurances on the ships and effects belonging to the subjects of *France*, then at war with *Great Britian*. The arguments of Sir *John Bernard* against the policy of such a restriction, though answered by Sir *Robert Walpole* and others, by arguments much more cogent and satisfactory, seem to have had greater weight upon that occasion than they merited; for though the bill was committed, it was afterwards dropped (*a*).

Such insurance occasionally restrained by statute.

In the year 1748, however, a bill was again brought in, to prohibit the insurance of the ships and merchandize of the subjects of *France*, during the continuance of the war with that country. And, though this was strenuously opposed by Sir *Dudley Rider* and Mr. *Murray*, then attorney and solicitor general, upon what they considered to

(*a*) Vid. Parl. Deb. published in 1742, Vol. 2. p. 459.

be

be principles of policy and expedience, yet it paſſed into a law *(a)*. A ſimilar law has been made in the preſent war, by the ſtat. 33 *G.* III. c. 27. ſ. 4. which not only declares ſuch inſurances to be void, but alſo ſubjects the parties concerned in them to three months impriſonment; ſo that, to judge by the opinion of the legiſlature, the *policy* of ſuch a prohibition ſeems to be now pretty well eſtabliſhed.

Whether at common law ſuch inſurance be valid.

Still, however, theſe reſtrictions are only temporary, and therefore it will be proper to enquire how the law ſtands, independently of them.

In every declaration of war is implied a prohibition of all the King's ſubjects to trade with the enemy; or, by the intervention of friends or allies, to convey to them ammunition, proviſions, or any kind of ſuccour. This comprehends, alſo, a prohibition to inſure the effects of the enemy, whether in their own ſhips or in thoſe of neutrals. For, to inſure their property, is, in effect, as I humbly apprehend, nearly the ſame thing as to trade with them.

Opinions of foreign writers on this point.

All the foreign writers agree that this contract cannot be lawfully made between the ſubjects of ſtates at war with each other. *Bynkerſhoek*, who has written a chapter on this very queſtion *(b)*, condemns ſuch inſurances as being contrary both to law and good policy. After defining inſurance, he ſays, '*Præmiſi quemadmodum aſſe-*
'*curatio ſit definienda, ut vel ex definitione conſtaret, rationem*
'*belli omni modo exigere, ne naves, ne merces, ne alia hoſtium*
'*bona liceat aſſecurare. Hoſtium periculum in ſe ſuſcipere,*
'*quid eſt aliud quam eorum commercia maritima promovere.—*
'*Juſtiſſimum id videri poterat, quia in ſingulis belli indic-*
'*tionibus quiſque tantum hoſtibus damni inferre jubetur,*
'*quantum poteſt. Quod ſi ſit, etiam vetatur quoquo modo*
'*hoſtium utilitati conſulere. Id exigit jus belli generale. Sin*
'*aias, ex ejuſmodi aſſecurationibus, plus lucri quam damni ferre*
'*aſſecuratores, adeoque noſtris quam hoſtibus, plus prodeſſe, id*
'*ais, quod eſt incertiſſimum, & de quo vix ipſa experientia*
'*ejudicare poterit, cum interim ſit certiſſimum, ſic hoſtibus cau-*
'*ſam præberi commercia ſua latius promovendi. Quod, quia*
'*hoſtibus eſt utile, & fere redundat in noſtram necem, omni*
'*ratione prohibendum eſt.*'

(*a*) Stat. 21 *G.* II. c. 4.—(*b*) Quæſt. jur. pub. lib. 1, c. 21.—Vid. *Le Guidon*, ch. 2, ſ. 5. *Pothier* h. t. n. 92.

Valin

Valin (a), after ſhewing that in *France* the inſurance of enemy's property was contrary to the law of that country, obſerves, in language bordering a little upon deriſion, that the *Engliſh* did not conſider the inſurance of enemy's property as prohibited by a declaration of war:—'For,' ſays he, 'they conſtantly, during the laſt war *(b)*, 'inſured our ſhips and cargoes, as in time of peace; 'whether they were deſtined for *France* or her colonies, 'or for the ports of her allies, or thoſe of neutrals:' 'That, it is true,' adds he, 'did not prevent our ſhips, 'when taken, being declared good prize; but the con-'ſequence was, that one part of that nation reſtored to 'us, by the effect of inſurance, what the other took from 'us, by the rights of war.'

Reaſons of policy againſt ſuch inſurances.

To this obſervation an *Engliſhman* might add, that in every conteſt between theſe rival nations, the naval ſuperiority of *Great Britain*, if not counteracted, muſt, in a ſhort time, ruin the commerce of *France*, provided it be not protected by *Britiſh* inſurances. But, with that protection, the utmoſt they can ſuffer will be the loſs of their premiums; and this will be more than compenſated by the captures made by their own cruiſers, unleſs they are very unfortunate indeed. Thus will this country loſe one of the greateſt benefits ſhe can hope to derive from her maritime ſtrength. But whatever may be the policy of permitting theſe inſurances, it ſeems that, till lately, a notion has prevailed in this country, and that ſupported by conſtant practice, that ſuch inſurances, when unreſtrained by ſtatute, were not illegal *(c)*; and the occaſional reſtraint of ſuch inſurances, from time to time by acts of parliament, has been fairly enough called in aid, to ſhew that ſuch was the opinion of the legiſlature, or that the queſtion was, at leaſt, doubtful, when thoſe acts paſſed.

Reaſons of expedience againſt it.

This practice, after all, ſeems to have ariſen in *England*,

(*a*) *Valin* h. t. art. 3. p. 32.—(*b*) *Valin* publiſhed his work in 1766, therefore the war he alludes to muſt be that which was terminated by the peace of Paris in 1763.—(*c*) Vid. the opinion of Lord *Hardwicke* in the caſe of *Henkle* v. *Roy. Ex. Aſſ.* 1 Ves. 320, and that of Lord *Mansfield*, in *Giſt.* v. *Maſon, Park*, 242, alſo the arguments for the plaintiff in the caſe of *Briſtow* v. *Towers*, 6 T. R. 35.

rather

ſurance, were ſettled and adjuſted by arbitration, and without reſorting to any legal proceedings. And there ſeems to have been a particular tribunal for ſuch arbitrations eſtabliſhed in *London*, compoſed of perſons annually appointed by the Lord Mayor, in imitation of ſome ſuch eſtabliſhments in other countries. *Malyne* informs us that there was an *Office of aſſurances* in the weſt ſide of the *Royal Exchange*, where inſurances were made, and to which belonged certain commiſſioners who were annually choſen, and who were probably the *grave and diſcreet merchants* alluded to in the above recital.

The ſame author adds, that the authority of theſe commiſſioners was confirmed by act of parliament, in the latter time of Queen *Elizabeth*, 'for the obtaining whereof,' ſays he, 'I have ſundry times attended the committees of 'the ſaid parliament, by whoſe means the ſame was en-'acted; not without difficulty, becauſe there were many 'ſuits in law by action of *aſſumpſit* before that time, 'upon matters determined by the commiſſioners for aſſu-'rance, who, for want of power and authority, could 'not compel contentious perſons to perform their ordi-'nances; and the party dying, the *aſſumpſit* was accounted 'to be void in law *(a)*.'

The court of policies of inſurance erected.

From this it is plain that the deciſions of the commiſſioners did not give entire ſatisfaction in all caſes; and either the inſurers began to decline their juriſdiction, and ſo drove the inſured to ſeek their remedy by actions at common law, or the inſured themſelves began to prefer that mode of proceeding. But be this as it may, the novelty was thought a great grievance, and the more ſo, as a ſeparate action was brought againſt each underwriter; ſo that it was thought expedient to give a check to this practice, and therefore the ſtatute we have juſt mentioned, 'gives 'power to the Lord Chancellor to award, under the great 'ſeal, a commiſſion to be renewed yearly, for the deter-'mining of cauſes ariſing on policies of inſurance entered 'in the office of inſurances in *London*; to be directed to 'the Judge of the Admiralty, the Recorder of *London*, 'two doctors of the civil law, two common lawyers, 'and eight diſcreet merchants, or to any five of them, 'who are empowered to hear and determine all ſuch

(*a*) *Mal.* Lex merc. 106.

'cauſes

'causes in a ſummary courſe, without formalities of pro-
'ceeding; and to bring parties before them, examine
'witneſſes, and enforce their decrees by impriſonment of
'the parties diſobeying them.' From theſe decrees, however, an appeal is given by bill in chancery.

Its powers enlarged.

This ſeems to have been little more than a confirmation of the authority aſſumed by the commiſſioners of the *Office of Aſſurances*, with a grant of the power of enforcing their decrees. But it happened in this, as it has in moſt caſes where it has been attempted to innovate upon the modes of adminiſtering juſtice preſcribed by the common law, that this new juriſdiction was found defective in many reſpects, and therefore the ſtat. 13 & 14 C. II. c 23. provides, 'that *three* inſtead of five commiſſioners,
'(of whom a doctor of the civil law, or a barriſter of five
'years ſtanding, ſhall be one), may act; that they ſhall
'have power to puniſh witneſſes for wilful delay; to
'direct admiralty commiſſions to iſſue for the examina-
'tion of witneſſes beyond ſea; to enable one commiſſioner
'to examine witneſſes going to ſea before a court can
'be ſummoned, notice being given to the adverſe party.'

Fallen into diſuſe.

But with all theſe additional powers, the court did not long continue to exerciſe its functions, and ſoon fell into diſuſe. To this many cauſes contributed; 1. Its juriſdiction being confined to ſuch inſurances only as related to *merchandize*, the court could not proceed in a caſe upon any other ſpecies of inſurance *(a)*, and the parties, in ſuch caſe, were obliged to reſort to the courts of common law.—2. It was determined, how properly it is not now neceſſary to enquire, that it was no bar to an action on a policy in one of the courts of *Weſtminſter*, to alledge that the plaintiff had before ſued the defendant, for the ſame cauſe, in the court of policies of inſurance, and that his ſuit was there diſmiſſed *(b)*. And it is not a little ſingular, that though this was decided in the year 1656, before the ſtat. 13 & 14 C. II.; yet the framers of that act made no proviſion to remedy a defect that muſt ſooner or later prove fatal to the juriſdiction of the court. —3. It was doubted whether its juriſdiction was not confined to ſuits brought by the inſured againſt the inſurer,

(*a*) R. *Bendyr* v. *Oyle*, *Sty.* 166, 172.—(*b*) *R. Came* v. *Mey*, 2 *Sid.* 121.

and whether it could afford any relief upon a complaint made by the latter againſt the former *(a)*.—It has been ſaid alſo, that the juriſdiction of the court was confined to ſuch cauſes only as aroſe in *London (b)*.—It is true, that the power given by the act is, 'to hear and deter-'mine cauſes ariſing on policies of aſſurance, ſuch as are 'now, or hereafter ſhall be, entered in the *office of aſ-'ſurances in the city of London.*' But we learn from *Malyne (c)* that in this office all policies were regiſtered *verbatim*, to the end that if a policy ſhould be loſt, the inſured might not be without evidence of the contract; ſo that it would ſeem that the object of the above clauſe was not to confine the juriſdiction of the court to policies made in *London*.

But beſide the defects of juriſdiction in the court, and the conſtant partiality of *Engliſhmen* for the common law forms of judicature, another cauſe, appearing on the face of the ſtatute itſelf, muſt have, in ſome degree, contributed to its downfal. The act directs, 'that the commiſ-'ſioners ſhall, once in every week at leaſt, meet and ſit upon 'the execution of the commiſſion; *and that no perſon, by vir-'tue of the act, might claim or exact any fee, for any matter or 'cauſe concerning the execution of the commiſſion.*' With ſuch a clauſe in the act, it will not be wondered, if the judges and officers of this court did not attend with the requiſite punctuality to the diſpatch of buſineſs. Indeed it would ſeem, from an obſervation of Mr. Juſtice *Twiſden*, in the caſe of *Suiſter* v. *Coel*, that the proceedings in this court, where *no forms of proceeding were to be obſerved*, were even more dilatory than in the courts of *Weſtminſter* (*d*).—It is remarkable, too, that the ſtat. 6 *G.* I. c. 18, which authorizes the eſtabliſhment of the two inſurance companies, expreſsly provides that all actions on the policies of theſe companies ſhall be brought in the courts of *Weſtminſter*. This ſhews that, at that time, the court of policies of inſurance was already fallen into diſuſe, or, what is more probable, that it was fallen into diſrepute, and that thoſe who promoted theſe eſtabliſhments meant to ouſt that court of all juriſdiction in ſuits upon their policies.

From this time, it may be reaſonably ſuppoſed, that all ſuits on policies of inſurance were brought in the courts of

Common law courts.

(a) Delbye v. *Proudfoot*, 1 *Show.* 396.—*(b) Park*, Introd. 45.—*(c)* Lex merc. 115.—*(d)* 2 *Keb.* 930.

common

common law; and yet but few queſtions on this ſubject appear to have been determined in the courts of *Weſtminſter* before the middle of the laſt century. Whether this aroſe from the number of inſurances in *England* being inconſiderable, compared to what they have ſince become, or from the parties being ſtill in the habit of ſettling their differences by arbitration, or from both theſe cauſes united, it is not eaſy now to determine. This, however, is certain, that after ſome of the deciſions of the courts of *Weſtminſter*, upon queſtions of inſurance, came to be generally known, the confidence which the juſtice, impartiality, and ability of thoſe courts inſpired throughout *Europe*, ſoon induced the merchants of all countries to prefer *Engliſh* inſurances to thoſe of any other country. Even our enemies, in time of war, were not afraid to rely on *Britiſh* juſtice, and they ſtill continued to cauſe the greateſt part of their inſurances to be effected in *London*, ſuch inſurances being for a long time moſt unaccountably tolerated by the *Britiſh* government (*a*).

Lord C. J. *Lee.* During the time when Lord Chief Juſtice *Lee* preſided in the court of King's Bench, many caſes came before him which were chiefly decided at *Niſi prius*, but upon ſuch juſt and ſound principles, that very few of them afterwards came before the court for reconſideration.

Lord *Mansfield.* Upon Lord *Mansfield*'s ſucceeding to the ſame high office, upon the death of Sir *Dudley Ryder*, he ſoon found a conſiderable influx of buſineſs to the court of King's Bench, ariſing, in a great meaſure, from the celebrity of his own talents. A great increaſe of inſurances, not only upon *Britiſh* commerce, but likewiſe upon that of other countries, produced, about this time, a number of cauſes upon this ſubject, to which it became neceſſary for him to turn his particular attention; and indeed he ſeems to have taken pleaſure in the diſcuſſion of queſtions ariſing upon this contract, in which, more, perhaps, than upon any other ſubject, he diſplayed the powers of his great and comprehenſive mind. From the books of the common law very little could be obtained: but upon the ſubject of marine law, and the particular ſubject of inſurances, the foreign authorities were numerous, and in general ſatisfactory. From theſe,

(*a*) See this ſubject fully conſidered *inf.* ch. 2, ſ. 1.

and

rather from a notion of policy and expedience, than from any principle of law. Mr. Justice *Buller*, in delivering his opinion in the case of *Bell* v. *Gilson (a)* says;—"In the years 1746 and 1747, Sir *Dudley Ryder*, Lord *Mansfield*, and other great men of that time, argued the question entirely on its expedience, and held that it was good policy to permit insurances on enemy's property. In later times, I well remember to have seen many policies tried professedly on enemy's property, without ever hearing the objection raised. Lord *Mansfield* did all in his power to prevent so dishonourable a defence being made. When the case of *Gist* v. *Mason (b)* came on, I more than once conversed with Lord *Mansfield* on the subject, being desirous to obtain his opinion on the legality of such insurances. On the *legality*, however, I never could get him to reason. He often said, that in former times it was considered to be for the interest of the country to insure enemy's property; and, on this persuasion he always *discountenanced* any objection on that head. But he never went beyond the ground of *expedience*. *At present*, I think such insurances are not expedient. The state of the countries at war is such as to make them otherwise. But the underwriters have taken care that such a case as this shall never arise again; for, from the moment that any one underwriter succeeds in this kind of defence, there is an end of insurances on enemy's property."

Lord *Mansfield*'s sentiments on this point.

From this statement of the learned judge, it is evident that he himself doubted, at least, of the legality of insurances on enemy's property, and that the opinion which he so anxiously sought, and which Lord *Mansfield* so studiously withheld, was, that, *in point of law*, they were void; but that he thought the law of *England* was, in this respect, impolitic and unwise.—Entertaining this opinion it was certainly competent to him and Sir *Dudley Ryder*, *as members of parliament*, to argue against the policy of the law, when the question was agitated *there*, whether these insurances should be restrained by an express statute or not; because every member of parliament has an undoubted right to call in question the wis-

(*a*) 1 *Pul.* & *Bos.* 354, post. 34.—(*b*) 1 *T. R.* 84.

dom, or the policy, of any rule of law, when he oppoſes the paſſing of a bill which is meant to enforce the obſervance of it. But to avow or inſinuate that it might, in any caſe, be proper for a judge to prevent a party from availing himſelf of an indiſputable principle of law, *in a court of juſtice*, upon the ground of ſome notion of fancied policy or expedience, is a new doctrine in *Weſtminſter Hall*, and has a direct tendency to render all law vague and uncertain. A rule of law, once eſtabliſhed, ought to remain the ſame till it be annulled by the legiſlature, which alone has the power to decide on the policy or expedience of repealing laws, or ſuffering them to remain in force. What politicians call expedience, often depends on momentary conjunctures, and is frequently nothing more than the fine ſpun ſpeculations of viſionary theoriſts, or the ſuggeſtions of party and faction. If expedience, therefore, ſhould ever be ſet up as a foundation for the judgments in *Weſtminſter Hall*, the neceſſary conſequence muſt be, that as different men muſt often entertain different notions of expedience, that which to day would be deemed law in one court, might be thought contrary to law to-morrow in another, or even in the ſame court. Indeed the learned judge himſelf has given us an inſtance of this; for he ſays, that *in the preſent war*, he thinks the inſurance of enemy's property *would not be expedient*, and yet he informs us, that Lord *Mansfield* was of opinion that it was for the intereſt of the country, *in his time*, to encourage ſuch inſurances.

If a policy be not illegal on the face of it, the court will not grant a new trial, to let in the defendant to ſhew by evidence that the inſurance was upon a trading with the enemy.

Giſt v. *Maſon*, 1 T. R. 84.

In the caſe of *Giſt*, v. *Maſon*, alluded to by Mr. Juſtice *Buller*, the court avoided the general queſtion, by refuſing a new trial, which would have enabled the defendants to prove the fact of trading with the enemy.—That was an action for money had and received, brought to recover the premiums upon ſeveral policies of inſurance, underwritten by the plaintiff for the defendants, who were *Weſt India* merchants, and had acted as their own brokers in getting theſe inſurances effected.—Upon the trial of the cauſe, it appeared, that the defendants had property in the *Weſt India* Iſlands, at the time they were captured by the *French*, during the *American* war: That it was a conſtant practice to ſupply theſe iſlands with proviſions from *Ireland*,

land, notwithstanding they were in the hands of the enemy: And that, in this trade, the defendants had employed neutral vessels, and had them insured from different parts of the continent, to *Ireland*, *Madeira*, and *Saint Thomas*'s, with liberty to go *to any one of the captured islands*. —On the part of the defendants, it was contended at the trial, that these voyages were illegal; and as both parties were in *pari delicto*, the maxim of law, *melior est conditio possidentis*, ought to prevail. But Lord *Mansfield*, being of opinion that these policies were not illegal *on the face of them*, directed a verdict for the plaintiff.—In his address to the jury, he said,—"It is for the benefit of this country to permit these contracts upon two accounts; the one because you hold the box, and get the premiums, at least as a certain profit; the other, because it is a certain way of obtaining intelligence of the enemy's designs; and I have known instances of intelligence procured by such methods (*a*)."—The defendants afterwards moved for a new trial, to let them into evidence to prove the nature of this trade, which was so notoriously illegal, that the plaintiffs must have known it to be so. And, as an excuse for not offering this evidence at the trial, it was said that it had been omitted on a presumption that the jury, of their own knowledge, must have concluded that the illegality of these contracts was known to the plaintiff at the time he underwrote the policies. But the court refused to grant a new trial. Lord *Mansfield* said,—"This, *upon the face of it*, is the case of a neutral vessel; and it is no where laid down, that policies on neutral property, though bound to an enemy's port, are void. And indeed I know no cases that prohibit, even a subject, trading with the enemy, except two; one a short note in *Roll's* abridgment (*b*), where trading with *Scotland*, then at war with *England*, was held to be illegal; and the other was a note, which was given me by Lord *Hardwicke*, of a reference in King *William*'s time to all the judges, on the question, whether it was a crime at common law, to carry corn to the enemy in time of war; who were of opinion that it was a misdemeanour. By the maritime law, trading

(*a*) This address to the jury does not make a part of the case in the Term Reports, but is taken from *Park*, 242.—(*b*) 2 *Rol.* Ab. 173.

with an enemy is cauſe of confiſcation in a ſubject, provided he be taken in the act; but this does not extend to a neutral veſſel."

Reaſons againſt the policy of permitting the inſurance of enemies goods.

Upon this caſe it will be ſufficient to obſerve, that even the arguments of policy urged by Lord *Mansfield*, in his addreſs to the jury, are by no means ſatisfactory. The premiums of inſurance can only be conſidered as a *certain profit*, when there is no poſſibility of loſs, which is repugnant to the very nature of inſurance; nor does it appear that theſe inſurances are likely to afford intelligence of the enemy's deſigns, without affording them, at the ſame time, the means of obtaining much better intelligence of ours. Every perſon concerned in theſe inſurances, muſt be under a ſtrong temptation to convey to the enemy all ſuch information as may put them upon their guard, at leaſt againſt attacks meditated againſt their trade.—Independent, therefore, of the general queſtion of the illegality of holding any commerce with the King's enemies, it cannot reaſonably be ſuppoſed that the law would tolerate a contract which has ſo ſtrong a tendency to betray a number of perſons into a breach of their allegiance. But be this as it may, two caſes have occurred during the preſent war, in which, though it has not been expreſsly determined that theſe inſurances are illegal, yet it has been decided, that no action can be maintained on any policy, at the ſuit, or on the behalf, of an alien enemy, at leaſt during the war, whether the inſurance be made before or after the commencement of the war, and though the goods inſured be of *Britiſh* manufacture, and ſhipped before the war began. Theſe caſes, independently of any parliamentary reſtraint, muſt in future throw a great impediment, at leaſt, in the way of ſuch inſurances.

An alien enemy cannot maintain an action on a policy on goods, though they were ſhipped before the war commenced. Nor can an agent of ſuch inſured maintain the action, though he be a creditor of the inſured for

The firſt of them was an action on a policy upon goods on board the *Greyhound*, an *American* ſhip, effected before the paſſing of the ſtat. 33 *G.* III. c. 27, "at and from *London* to *Bayonne*".—It was averred in the declaration, that the policy was effected on account of certain perſons therein named, who were intereſted in the goods, and that the ſhip was captured by the *Engliſh*.—The defendant pleaded firſt, that the perſons intereſted were aliens, born in *France*, within the allegiance of the *French* King; that before the

ſhip

ſhip ſailed, a war broke out between the King of *Great Britain* and the perſons exerciſing the powers of government in *France*; that the perſons intereſted were inhabiting and commorant in *France*, under the government there; and that they were enemies of our King, and adhering to his enemies, &c.—*Secondly*, That the defendants were *living in France*, and enemies of the King; and that the goods were ſent from *London*, after the commencement of the war, for the purpoſe of being landed in *France*, and delivered in a courſe of trade to the King's enemies.—To the firſt of theſe pleas, the plaintiffs replied, That the perſons intereſted were indebted to them in more than the value of the goods inſured; and to the ſecond, That the goods were not prohibited at the time when the policy was effected, and that they were ſhipped before the commencement of the war.—Upon demurrer to each of theſe replications, the court gave judgment for the Defendant, being clearly of opinion, that no action whatever could be maintained by, or in favour of, an alien enemy.—Lord *Kenyon* ſaid, "that the caſe of *Anthon* v. *Fiſher* (*a*), proceeded on the ſame principle: That there was no caſe in which the action had been ſupported in favour of an alien enemy; for though it was held in *Ricord* v. *Bettingham* (*b*), that the action by an enemy on a ranſom bill might be maintained, the action was not brought till peace was reſtored."

more than the ſum inſured.

Brandon v. *Nefbitt*, 6 T. R. 23.

The inſurance, in this caſe, having been made before the commencement of the war, was perfectly legal; and the inſured only failed in their action on account of their temporary diſability to ſue. And it would ſeem, from theſe latter words of Lord *Kenyon*, that upon the return of peace, they might have maintained their action.

In the other caſe, it appeared that the plaintiff, as agent, in purſuance of directions for that purpoſe, cauſed an inſurance to be made on account of *Arrouet* and others, ſubjects of *France*, on goods, conſiſting of *Britiſh* manufactures, ſhipped on board the *Nancy*, an *American* veſſel, on the 19th of *March* 1793: That previous to the inſurance and ſhipping of the goods, general repriſals were granted againſt *France*, and an embargo laid on all foreign

Neither can an action be maintained on a policy on the property of an alien enemy, though of *Britiſh* manufacture exported from hence.

Briſtow v. *Towers*, 6 T. R. 35.

(*a*) *Doug.* 648, 9, n.—(*b*) 3 *Bur.* 1734, 1 *Bl.* 563.

veſſels, except thoſe belonging to ſtates in amity with the king, not having naval or military ſtores, or any other prohibited articles on board: And that the ſhip having ſailed on her voyage, was captured by the *Engliſh*, and the goods inſured condemned as *French* property.—Upon this caſe, which came before the court of King's Bench upon a ſpecial verdict, ſtating the above facts, the court held clearly that it could not be diſtinguiſhed from the above caſe of *Brandon* v. *Neſbitt*, and therefore gave judgment for the defendant.

Here, the inſurance being on property belonging to perſons who were in the ſituation of alien enemies at the time the policy was effected, afforded an opportunity of deciding the general queſtion. But though the objection was made and fully argued, yet, according to the report of the caſe, the court expreſſed no opinion on that point, but gave judgment for the defendant, without ſtating any other ground than that it could not be diſtinguiſhed from the the foregoing caſe of *Brandon* v. *Neſbitt*.—But as the ground of the deciſion in that caſe was not, that the contract was *void*, but merely that an action could not be maintained at the ſuit of an *alien enemy*, the general queſtion ſtill remains undecided.

But the following caſe ſhews, that a neutral, though reſiding in the enemy's country, and carrying on trade there, and even in partnerſhip with an alien enemy, may inſure his intereſt in the joint property.

A neutral reſiding in the enemy's country, and carrying on trade there in partnerſhip with an alien enemy, may inſure his intereſt in the joint property.

An inſurance was made on the one half of a ſhip, &c. at and from *L'Orient* to the ſouthern whale fiſhery.—In an action brought to recover a loſs by the detention of the *French* government, it appeared that the inſured was a ſubject of the *United States of America*, and had formerly reſided ſeveral years in *London*, but for ſome years previous to the making of the inſurance in queſtion, had dwelt at *L'Orient*, and was jointly concerned in the ſouthern whale fiſhery, with *M. Berard*, a native of *France*, reſident at *L'Orient*, but their intereſts were inſured by ſeparate policies, effected by ſeparate agents. The plaintiff, ſhortly before making the inſurances in queſtion, came to *England*, and returned to *France* previous to the commencement of hoſtilities with *Great Britain*; and, having remained

Roteh. v. *Edie*, 6 T. R. 413, *inf.* c. 12. ſ. 4.

mained there about four months, returned again to *England*, and continued to reſide there from that time.—It was inſiſted, on the part of the defendant, that, as the inſured, at the time the inſurance was made, was domiciled, and carried on trade in *France*, and owed a temporary allegiance to the governing power of that country, the objection applied as ſtrongly to his recovering, as if he were a natural born ſubject of that country.—But the court determined, that the plaintiff, not being an alien enemy, but a native of *America*, and then reſiding in *England*, was under no diſability to ſue in this caſe; and that the conſequence of allowing this objection would be, to render it illegal to inſure the property of neutrals in an enemy's port.

Sect. 2.

What Perſons may be Inſurers.

Underwriters.

INSURANCE is a ſpecies of game which requires great prudence and circumſpection in thoſe who are engaged in it as underwriters. They ſhould be expert in analyſing riſks and calculating probabilities; in foreſeeing the dangers of the ſea, and the danger of fraud. They ſhould be able to form a ſound judgment by combining all circumſtances, and comparing them with the rate of premium. To form ſuch a judgment, in many caſes requires great ſagacity, penetration, and experience. But if men poſſeſſing all theſe advantages are ſometimes deceived, what muſt be the ſituation of thoſe who, allured by the deſire of gain, blindly put their ſignatures to every policy that is preſented to them, without conſidering the precipice to which their temerity leads them. A wiſe underwriter will judge for himſelf, and not implicitly follow others who may have ſubſcribed before him, however remarkable for ſagacity and experience *(a)*.

Character of the *French* underwriters.

In *France*, the underwriters, if we may credit ſome of the beſt *French* authors of that country, were never remarkable for their readineſs to do juſtice to the inſured. They are ac-

(*a*) Pondera ſe i firmati poſſino eſſere delfino da indurre altri, *Targa*, c. 52, n. 33.

cuſed of reſorting to captious exceptions and fraudulent ſubterfuges to elude the payment of their loſſes *(a)*. *Aſſecuratores plerùmque differendæ ſolutionis gratiâ, nodum in ſcirpo quærunt (b)*.

Character of the *Engliſh*.

With us, if there are a few underwriters who, under the guidance of ill adviſers, ſometimes ſet up unworthy objections, there are many who are the victims of their own good faith and eaſy credulity *(c)*. The moſt cautious find it extremely difficult to eſcape the ſnares which knavery prepares for them. No wonder, then, if they are ſometimes tempted to make captious exceptions, when it is conſidered that they can only ſee with the eyes of the inſured, that, in general, they can only defend themſelves by ſuch papers, and other ſcraps of evidence as they can obtain from the ſame quarter; and that, with all the precautions they can employ, they often pay what they might juſtifiably diſpute.

The two inſurance companies erected by the 6 *G.* I, c. 18.

At common law, any man, or company of men, might be inſurers; and individuals, upon their own ſeparate account have ſtill the ſame right.—But, it was ſuppoſed, about the beginning of the preſent century, that commerce had ſuffered conſiderably by perſons in inſolvent circumſtances underwriting policies of inſurance; and having received large ſums in premiums, becoming bankrupts, or otherwiſe failing in making good their loſſes. To remedy this, but more, perhaps, to enable government to raiſe a ſum of money by the ſale of a monopoly, it was thought expedient to erect two companies for the purpoſe of making marine inſurances, with ſuch funds to anſwer all demands on their policies, as might give confidence to ſuch mercantile adventurers as were unwilling to depend on individual underwriters; ſtill, however, leaving to merchants the option of inſuring with ſuch underwriters when they thought proper. To this end, the ſtat. 6 *G.* I. c. 18. authoriſed the King to grant charters to two diſtinct companies or corporations

(*a*) Vid. *Emerig.* vol. 2, p. 244. On les a comparés aux femmes qui conçoivent avec plaiſir, & qui enfantent avec douleur. —(*b*) *Straccha* gl. 29. n. 1.—(*c*) Modernis his temporibus, quibus fraudes à *navarchis* frequentius committuntur, digni potiùs miſeratione cenſeri debent aſſecuratores, quàm aſſecurati. *Caſaregis*, diſc. 11, n. 3.

for

for the insurance of ships, goods and merchandizes at sea, or going to sea, and for lending money on bottomry. They were to be invested with all the powers usually granted to corporations, and the privilege of purchasing lands to the amount of 1000*l. per annum.* Each was to provide a sufficient capital, and a competent stock of ready money, to answer all demands on their policies.

A charter granted to each, 22d of *June*, 1720.

In pursuance of the powers given by this act, the two proposed companies, the one called the *Royal Exchange Assurance*, and the other, the *London Assurance*, were established by Royal charter, bearing date the 22d day of *June*, 1720.

All other companies are restrained from insuring ships and goods at sea, or lending money on bottomry.

But the most important privilege granted by this act to these companies was the exclusive right of making marine insurances, and lending money on bottomry, as a *company or partnership*, on a *joint capital*. For this purpose the act (sect. 12) declares that, 'during the continuance of these 'corporations respectively, all other corporations then in 'being, or afterwards to be established, whether sole or 'aggregate, and all societies and partnerships for insuring 'ships and merchandizes at sea, or going to sea, and 'for lending money on bottomry, shall be restrained from 'granting, signing, or underwriting, any policies of insu-'rance upon any ships, goods, or merchandizes, at sea, or 'going to sea, and from lending money on bottomry: And 'that if any corporation or persons in partnership, (other 'than the said two companies), shall presume to grant, 'sign, or underwrite any such policy, or make any such 'contract of insurance, every such policy shall be *ipso 'facto* void; and all sums, so signed and underwritten, 'shall be forfeited, one moiety to the King, the other 'to the informer, who shall sue for the same in any of 'the courts of *Westminster*. And if any such corpora-'tion or partnership, (other than the said two compa-'nies respectively), shall lend, or agree to lend, any money 'on bottomry, the bond, or other security for the same, 'shall be void, and such agreement adjudged to be an 'usurious contract, and the offenders shall suffer as in 'cases of usury. Nevertheless it is declared, that any 'pri-

And all policies made by any such company shall be void, and the sums underwritten forfeited.

And all bottomry bonds deemed usurious.

But the right of individual insurers continues as before the act.

'private or particular perſon or perſons ſhall be at li-
'berty to underwrite any policies, and engage in any in-
'ſurances, upon ſhips, goods, or merchandizes, at ſea,
'or going to ſea, or may lend money on bottomry; ſo
'as the ſame be not upon account or riſk of any cor-
'poration, company, or partnerſhip *(a)*.'

A learned author on the ſubject of inſurance thinks that this monopoly was injudiciouſly granted to theſe two great companies *(b)*. But it muſt be owned that from the time this grant was made, down to the preſent day, theſe companies have conducted themſelves with the utmoſt liberality, and have carried on their buſineſs with equal credit to themſelves, and advantage to the commercial world.

The privileges of the *Eaſt India* and *South Sea* companies reſerved.

The rights and privileges of the *Eaſt India* and *South Sea* companies, which they enjoyed before, are reſerved and ſecured to them by this act, except as to the inſurance of ſhips and merchandize.

Contracts made in derogation of the rights of the inſurance companies are illegal and void.

The object of the 12th ſection of the act was, not only to reſtrain avowed partnerſhips from making inſurances publicly in their partnerſhip names, but alſo to ſecure to theſe companies the excluſive right of inſuring ſhips and goods at ſea, *as a company upon a joint capital*, by making it illegal to employ any other joint ſtock in this ſpecies of inſurance. And the following caſe will ſhew, that no contract ariſing out of any agreement made in derogation of this right can be legal or binding.

A. and B. are jointly engaged in inſurance, and A. pays more in loſſes than he receives in premiums, and both become bankrupts.—A.'s aſſignees ſhall not recover from thoſe of B. a moiety of the money thus advanced.

Mitchell v. Cockburn, 2 H. Bl. 379.

A. and B. were jointly engaged in the buſineſs of inſurance, which was carried on in the name of A., and became bankrupts.—A. having paid much more for loſſes than he had received in premiums, his aſſignees brought an action againſt the aſſignee of B. to

(*a*) This excluſive privilege of making marine inſurances upon a joint capital was expected to prove ſo profitable to theſe companies, that, as the price of the conceſſion, they agreed to pay 600,000l. to diſcharge the debts of the civil liſt. But they very ſoon diſcovered that they had agreed to purchaſe this monopoly at too high a price; for by the 7 *G.* 1. c. 27, ſ. 26, it appears that 188,750l. of the quota of each company remained unpaid, which ſum, on account of the difficulties they then laboured under, was remitted to them.—(*b*) Vid. *Millar* 13.

recover

recover a moiety of the money thus advanced.—Upon the trial before Lord C. J. *Eyre*, the plaintiffs were nonſuited; his Lordſhip being of opinion, that, this demand ariſing out of a partnerſhip prohibited by the ſtat. 6 *G.* I. c. 18, no action could be maintained for it.—Upon a motion to ſet aſide this nonſuit, it was contended on the part of the plaintiffs, that the object of the ſtatute was to prevent a competition between the inſurance companies and any other *open and oſtenſible partnerſhips*, which might gain credit in oppoſition to the companies; but here only one individual appeared, on whoſe ſingle ſecurity the inſured relied.—But the court were unanimouſly of opinion that the nonſuit was right; for the proviſions of the act would be at an end if a perſon, by inſuring in his own name, could have the benefit of a joint capital, which the act expreſsly prohibits, though the party ſubſcribing ſhall be eſtopped from ſetting up a ſecret partnerſhip to defeat a *bonâ fide* inſurance.

A., an underwriter, pays a loſs, and B. his ſecret partner pays his ſh re to the broker for the uſe of A.;—A. cannot maintain an action to recover this money from the broker.

Sullivan v. *Greaves*, at N.P. after Eaſt. 1789, *Park* 8.

So, where an underwriter paid the whole loſs upon a policy, and one *Briſtow*, who had agreed to divide the riſk with him, alſo paid his moiety to the broker.—The underwriter brought an action againſt the broker for this money, as being money received by him from *Briſtow* to his uſe.—Lord *Kenyon*, who tried the cauſe, was clearly of opinion, that this was a partnerſhip within the act of parliament; and held that the underwriter could not maintain an action againſt the broker to recover the moiety ſo paid to him by *Briſtow*, and nonſuited the plaintiff.—"If," ſaid his Lordſhid, "a ſingle name appear upon the policy, as in this caſe, the inſurer ſhall never be allowed, if a loſs happen, to defeat a *bonâ fide* inſurance, by ſaying to an innocent perſon, that there was a ſecret partnerſhip between himſelf and another, ſo as to avoid the policy. But here the plaintiff is himſelf the underwriter, who comes to enforce an illegal contract: It is a partnerſhip *pro hâc vice*; and this party cannot apply to a court to enforce a contract founded in a breach of the law."—No motion was ever made to ſet aſide this nonſuit; and Lord *Kenyon*, ſome time after, took occaſion to mention to the bar, that he had ſtated the caſe to the reſt of the judges of

of the court, who all concurred with him in the opinion he had given.

Nor can the oſtenſible underwriter, on the ground that the partnerſhip was illegal, recover from the broker the profits of ſuch partnerſhip inſurances,

Upon the ſame principle which governed theſe two caſes, it has alſo been determined that an action cannot be maintained on behalf of the oſtenſible underwriter, againſt the broker who managed the inſurances of a partnerſhip, to recover a balance in his hands ariſing from the profits of thoſe inſurances, even upon the ground that the partnerſhip was illegal, and the oſtenſible underwriter the ſole inſurer.

A. B. and D. become partners as underwriters, in the name of A.—C. and D. receive the premiums as inſurance brokers.—A. cannot diſaffirm the partnerſhip by inſiſting that he alone was the inſurer, ſo as to recover from C. and D. the money received by them for A. B. and D.

Booth v. Hodgſon, 6 T. R. 405.

Thus: A. and B. were partners, as merchants; and C. and D. were partners, as inſurance brokers: A. B. and D. agreed to become partners as underwriters; but the name of A. only was to be uſed. Policies were, from time to time, ſubſcribed in the name of A., ſometimes by himſelf, ſometimes by D., and premiums were received, which, (after deducting loſſes, &c.), amounted to £.2455 17*s.* 1*d.*—A. and B. employed C. and D. as brokers, to get inſurances effected for them, and became indebted to them in £.2269 11*s.* 5*d.* for premiums.—A. became bankrupt, and his aſſignees brought an action againſt C. and D. to recover the above ſum of £.2455 17*s.* 1*d.* as money had and received by them to the uſe of the bankrupt. —Upon this caſe, the queſtion for the opinion of the court was, whether the plaintiffs were entitled to recover the whole ſum of £.2455 17*s.* 1*d.* as the net profit of the inſurances made in the name of A.; and if ſo, whether the defendants had a right to ſet off the £.2269 11*s.* 5*d.* —It was inſiſted on the part of the plaintiffs, that, though the partnerſhip between A. B. and D. as underwriters was illegal and void, and to be laid out of the caſe, yet the inſurances were not ſo; and it would be unjuſt, that, where the inſured had had the benefit of the policies, the inſurer ſhould be liable to the riſk, and yet not be intitled to the premiums: That as the money muſt be conſidered as actually received by the defendants as brokers for A. *only*, they ought not to object to paying it to his aſſignees on account of an illegal contract between him and others.—But the court were unanimouſly of

of opinion, that the plaintiffs were not entitled to recover any thing.—They ſaid, that the object of the ſtat. 6 *G.* I. c. 18. was to protect the two companies from any competition with other companies formed into partnerſhips; and it enacted that all policies contrary to theſe proviſions ſhould be void: But, that it was only void as between the inſurer and his ſecret partners, not as between him and the inſured, who knew nothing of the partnerſhip: That, as the plaintiffs, however, avowed that the bankrupt had inſured in direct violation of the ſtatute, and as all their claim aroſe out of this illegal tranſaction, the law could give no effect to it: That, as to the money being received by the defendants to the uſe of A. only, that was an inference contrary to the fact; for they received it for the uſe of the partners in an illegal partnerſhip; and, as between A. and his partners, the plaintiffs could not be ſuffered to diſaffirm the partnerſhip. They conſidered the foregoing caſes of *Sullivan* v. *Greaves*, and *Mitchell* v. *Cockburne*, as clear authorities in favour of the defendants.

It is obſervable that though the ſtatute declares that every policy ſubſcribed by any other partnerſhip than the two companies ſhall be *ipſo facto* void; yet, in each of the three foregoing caſes, it was diſtinctly declared that though theſe partnerſhip contracts were void, as between the partners themſelves, yet that, as between the underwriter and the inſured, who knows nothing of the partnerſhip, they are good and binding. This, indeed, muſt have been the meaning of the legiſlature. Therefore, if a ſingle name appear upon the policy, the perſon who ſubſcribed it ſhall never be allowed, if a loſs happen, to defeat a *bonâ fide* inſurance, by ſaying to an innocent perſon, that there was a ſecret partnerſhip between him and another, ſo as to avoid the policy.

Though ſuch contracts are void, as between the ſecret partners, they are not ſo as between the underwriter and an innocent inſured.

But the rigour of the principle which governed the court, in the deciſion of the three foregoing caſes, ſeems to have been, in ſome degree, relaxed in the two following ones, in which it appears to have been the opinion of Lord *Kenyon*, and the court of *King's Bench*, that inſurances may

Yet inſurances may be legally made upon a joint capital, provided each ſubſcriber be not liable for the whole.

may be legally made upon a joint capital, provided each ſubſcriber to it be only liable to the amount of his ſubſcription, and not each for the whole.

A number of ſhip owners ſubſcribe a ſum proportioned to their ſhipping, to a common ſtock which becomes a fund for the payment of all loſſes: As each individual is only liable for the ſum he undertakes, and not each for the whole, the policy to underwritten is not illegal.

Harriſon v. *Millar*, at N. P. after *Mich.* 1796, 7 T. R. 340. n. *Eſt.* Rep. 513.

The firſt caſe I ſhall mention, though not the firſt in point of time, was an action on two policies of inſurance on the *Ann* and *Elizabeth*, from *Dantzic* to *London*.—The plaintiff and defendant were members of the "*Whitby* "Aſſociation," conſiſting of a number of perſons, owners of ſhips, each of whom in proportion to his ſhipping, paid a certain ſum, which formed the ſtock of the ſociety. The policies were ſigned by all the members. All inſured for each other, according to the reſpective values of their ſhips; and when any loſs happened, the treaſurer paid it out of the joint ſtock. The defendant's ſhare of the preſent loſs was 14 l. Each individual was only liable for the ſum he had undertaken.—On the part of the defendant it was objected, that the policies were void in law, as being againſt the ſtat. 6 *G.* I. c. 18.—But Lord *Kenyon*, before whom the cauſe was tried, over-ruled the objection.—He ſaid,—"This does not infringe on the act of Parliament, as the members of the aſſociation have only underwritten in their individual characters: But they cannot underwrite for themſelves and partners. If all of them were liable to the extent of their whole ſtock, it would be illegal. At preſent the members of this aſſociation only ſtand as individual underwriters for ſmall ſums."—The cauſe was at laſt referred, to inquire whether the money paid into court was ſufficient to cover the loſs.

But if all the members agree to make good the deficiency, in caſe any become inſolvent, the agreement is void.

But if, in ſuch caſe, the ſubſcribers to ſuch an aſſociation agree that, in caſe of the inſolvency of any of the members, his ſhare of any loſs ſhall be made good by the other ſubſcribers, the contract will be void; this being the very ſpecies of joint inſurance which the ſtatute meant to prohibit.

A company agree to inſure each other's ſhips, and covenant *ſeverally*, and not jointly, to pay in caſe of

As, where articles of agreement were executed by a number of perſons, deſcribing themſelves to be owners and part owners of ſhips, who had agreed to become a company or ſociety for the inſurance of ſhips, and who covenanted

venanted with a truſtee for themſelves *ſeverally*, and not jointly, that they would ſeverally engage and bind themſelves for the inſurance of ſhips, and parts of ſhips, belonging to the ſeveral parties, along with their own ſeveral and reſpective parts of any ſhips, from the 1ſt of *June* 1787 for 21 years, ſubject to certain conditions and regulations, &c.: That in caſe of a total loſs of any ſuch ſhip, the ſubſcribers covenanted *ſeverally* to pay their reſpective proportions of the ſum of 1000 l. to the perſon who ſhould have entered, and inſured ſuch ſhip; and one regulation was, "That in caſe any member of the company ſhould become inſolvent, or unable to pay a proportionable part of any loſs that might happen, *the proportionable part of ſuch inſolvent member ſhould be made good by the other members*; and that all coſts, charges, and expences of any action brought, or defended, by order of the committee, *ſhould be borne and paid equally by the reſpective members.*"—In an action of covenant brought on theſe articles by one of the ſociety againſt the truſtee, the court of *King's Bench*, upon demurrer, determined that the action could not be maintained, the articles of agreement being void by the ſtat. 6 *G.* I. c. 18. ſ. 12.—Lord *Kenyon* ſaid,—"That the meaning of the legiſlature, in paſſing that act, was, that, as the two inſurance companies were to have a monopoly up to a certain extent, in conſideration of certain ſums of money paid by them to the public, there ſhould be no competition between them and any other public body; but that private individuals might ſtill continue to inſure on their own account: That the caſe of *Harriſon* v. *Millar* (*a*), ſeemed to have been properly decided. There, each perſon undertook for himſelf only, according to the value of his own ſhare: But here, in caſe of the inſolvency of any one of the members, all the others were liable to make good his ſhare of the loſs: That this was adding the credit of the reſt of the members of the ſociety, which was the very thing that the act intended to prevent.

loſs, in proportion to their reſpective ſhares; but in caſe of the inſolvency of any, the others to make good the deficiency: This is void by the ſtatute.

Lees v. *Smith*, 7 T. R. 338.

(*a*) Sup. 46.

CHAP. III.

Of the ſubject matter of marine inſurances.

HAVING ſhewn in the foregoing chapter what perſons may be parties to this contract, we now proceed to conſider the *ſubject matter* of it.

Inſurances are moſt commonly made on goods and merchandize, ſhips, freight, and bottomry loans. But there are certain articles, which, from motives of public policy, cannot be legally inſured in this country, and others which can only be inſured under particular reſtrictions. It will be the buſineſs of the preſent chapter to particularize theſe, and to ſhew by what laws, and under what circumſtances, the inſurance of them is regulated or reſtrained. This may be done under the following heads, viz.

1. Smuggled goods;
2. Prohibited commerce with the *Britiſh* colonies;
3. Warlike ſtores ſent to the enemy;
4. Goods bought of the enemy;
5. The wages and effects of the captain and ſailors;
6. Freight;
7. Slaves;
8. Profit.

Sect. 1.

Smuggled goods.

An Inſurance on prohibited commerce is void.

In general it may be laid down as a rule, that no inſurance can be made on any ſpecies of goods and merchandizes, intended to be imported or exported, contrary to the laws of this kingdom, or thoſe of its dependances, or the law of nations; and that if the intended commerce be contrary to any of theſe laws, an inſurance made to protect it will be illegal and void. For the law would be inconſiſtent with itſelf, were it to give validity to a contract which is meant to protect a party from the riſks

riſks attending an infringement of the law. The ſame principle prevails in all other maritime ſtates; and foreign writers, particularly the *French*, lay it down as a rule, that the promiſe of the inſurer, however generally expreſſed, will not comprehend the caſe of any commerce prohibited by the law of the place where the contract is made (*a*).

The inſurer may take advantage of this objection, though he knew the trade to be illegal.

And, with us, this rule holds, even where the inſurer is apprized of the nature of the trade: For though the objection, in ſuch caſe, muſt always come with an ill grace from an inſurer who has accepted the premium, and promiſed the indemnity; yet the courts are bound to allow the objection; not, indeed, for the ſake of the inſurer, but in obedience to the law, which is founded on general principles of policy, and, of which, by a ſort of accident, the inſurer is permitted to take advantage, contrary to the real juſtice of the caſe, as between him and the inſured (*b*).

Opinions of foreign writers on this point.

Roccus does not ſeem to have underſtood that this objection was founded in *public policy*, for he conſiders it as a diſcharge of the inſurer, only where he has had no *notice* of the illegality of the trade (*c*). But *Bynkerſhoek*, with more enlarged notions of juriſprudence, puts this matter upon its true ground (*d*). He holds that the contract is void, though the goods inſured be expreſsly ſtated to be contraband.

(*a*) Vid. *Roccus*, n. 21, *Le Guidon*, ch. 2, art. 2 & 5, *Cleirac*, p. 233. *Valin* ſur art. 49, h. t. p. 127, *Pothier*, h. t. n. 58. *Emerig.* tom. 1, p. 211. Vid. alſo *Molloy*, b. 2, c. 7, ſ. 15.—(*b*) Vid. Lord *Mansfield*'s judgment in *Holman* v. *Johnſon*, *Cowp.* 343.—(*c*) "Aſſecuratio facta, quantumvis generalis, non comprehendit res vetitas aſportari; et quando dominus mercium aſſecuratarum devehi fecerit res prohibitas, *ignorante aſſecuratore*, cujus cauſâ pervenitur ad perditionem mercium vel navis,—non tenetur aſſecurator."—*Roccus*. h. t. n. 21. *Santerna*, parts 4, n. 17, uſes the ſame words, *ignorante aſſecuratore*.—(*d*) "Si vel nominatim expreſſum ſit *contrabanda*, vel res hoſtiles, aſſecurari, ne ſic quidem aſſecuratorem teneri, *quia nullus eſt contractus*, et contractus qui nullus eſt, implere vel non implere, pendit a mera voluntate contrahentium. Quod autem meræ voluntatis eſt in judicio defendi nequit." *Bynk.* quæſti. jur. pub. lib. 1, c. 21.

What is meant by contraband and ſmuggled goods.

Goods are ſaid to be prohibited or contraband, when the importation or exportation of them is abſolutely forbid by law, from motives of commercial policy. Such are many foreign manufactures, the importation of which is wholly prohibited, with a view of encouraging ſimilar manufactures of our own. The exportation of wool, and other raw materials, tools, and machinery employed in manufactures, is alſo prohibited from ſimilar motives. Moſt other articles of commerce are allowed to be imported or exported, ſubject to certain duties or cuſtoms; and when prohibited goods, or goods on which the duties have not been duly paid, are attempted to be imported or exported, they are uſually called *ſmuggled*, or *run goods*.

By 4 and 5 *W.* and *M.* c. 15, perſons inſuring the delivery of ſmuggled goods, and alſo the inſured, ſhall forfeit £. 500.

But the mere illegality of the contract has, in many inſtances, been found inſufficient to prevent great frauds from being committed againſt the revenue, and againſt the prohibitory reſtrictions above alluded to, by perſons who, for certain premiums, made it a practice to undertake, at their own riſk, to deliver ſmuggled and contraband goods into the warehouſes of the owners, free from duty; thus becoming, not only the carriers, but the *inſurers*, likewiſe, of ſuch goods, even againſt the riſk of ſeizure and confiſcation. To remedy this evil, the ſtat. 4 and 5 *W.* and *M.* c. 15. ſ. 14, provides, 'That all perſons, who, by way of inſurance or otherwiſe, ſhall undertake to deliver any goods imported into *England*, without paying the duty, or any prohibited goods; or ſhall, in purſuance of ſuch inſurance or agreement, knowingly deliver any prohibited or uncuſtomed goods, ſhall, for every offence, forfeit £. 500, above all other forfeitures.'—The ſame penalty is impoſed on perſons who ſhall agree to pay for ſuch inſurance, or knowingly receive ſuch goods.—'And if the inſurer ſhall diſcover the ſame, he ſhall keep the inſurance money, be diſcharged from all forfeitures, and have half the penalties impoſed on the party inſured or receiving the goods. If the inſurer do not make ſuch diſcovery, the party inſured may do ſo, and he ſhall have back his inſurance money, and half the the penalties impoſed on the inſurer, and be diſcharged from his own forfeitures.'—And the ſtat. 8 and 9 *W.* and

Encouragement to either party to inform againſt the other.

M.

M. c. 36, made for the encouragement of the ſilk manufacture, ſubjects all perſons guilty of delivering foreign alamodes and luſtrings to be *held to bail* for the penalties impoſed by the above act of the 4 and 5 *W.* and *M.* c. 15.

In ſome caſes the ſmuggler may be held to bail.

In like manner, it became a practice with perſons engaged in the clandeſtine exportation of wool from *Great Britain* to foreign parts, to inſure the delivery of it to the conſignee. To reſtrain this pernicious practice, the ſtat. 28 *G.* III. c. 38. ſ. 45 and 9. declares, 'That if any perſon, by way of inſurance or otherwiſe, ſhall undertake or agree that any ſheep, wool, &c. ſhall be carried to parts beyond the ſeas, from any place within this kingdom; or, in purſuance of ſuch inſurance, ſhall deliver any wool, &c. in parts beyond the ſeas, ſuch perſon, and all aiders and aſſiſtants, ſhall, upon conviction, forfeit 50 l., and ſuffer ſix months ſolitary impriſonment.' And (by § 46.) the like puniſhment is awarded againſt perſons 'who ſhall pay, or agree to pay, for ſuch inſurance, and the articles inſured ſhall be forfeited. 'And (by § 47.) 'any perſons, concerned in ſuch inſurance, who ſhall 'inform againſt the others, ſhall be freed from all penalties, and be intitled to the things inſured.' 'And (by § 48.) all inſurances on goods and merchandizes to 'be exported from *Great Britain* to foreign parts, which 'ſhall afterwards appear to be wool, &c. ſhall be void, 'notwithſtanding any words or agreement inſerted in the 'policy; and nothing ſhall be recovered for any loſs or 'damage, or for the premium upon ſuch inſurance.'

Penalties for inſuring the delivery of wool in foreign parts, or paying for ſuch inſurance.

When the inſurance is on goods generally.

Whether a trade prohibited by the laws of one country may be the ſubject of a legal inſurance in another, is a queſtion upon which there has been ſome difference of opinion amongſt writers on the law of inſurance.—*Valin (a)* ſupports the affirmative, and ſays, that though an inſurance on goods, the importation or exportation of which is prohibited by the laws of *France*, is void; yet, when the prohibition is by the laws of another country, if the inſurer be appriſed that the goods inſured are contraband, he is bound by the contract: If he be ignorant of this, it

Whether a trade prohibited in one country may be the ſubject of a legal inſurance in another.

(a) Art. 49, p. 127.

is agreed on all hands that he would not be bound, for he could not be ſuppoſed to ſubject himſelf to the riſk of ſeizure and confiſcation, unleſs he had notice that the goods were contraband, and received a premium adequate to the nature of the riſk. In ſupport of this opinion he cites a ſentence of the admiralty of *Marſeilles* confirmed by an *arrêt* of the Parliament of *Aix* of the 30th of *June* 1758, where the inſurance was upon raw ſilk meant to be ſmuggled out of *Spain*. This ſentence was founded upon a *conſultation*, or written opinion, of *Emerigon*, who labours to prove that goods may be inſured in *France*, which are contraband only with reſpect to foreign countries, provided they are not ſo by the laws of *France*. "The exportation of certain goods," ſays he, "may be prohibited by His *Catholic Majeſty* as ſtrictly as he pleaſes; but his laws are no rule of conduct for *Frenchmen*, who are unqueſtionably permitted in *France*, to import bullion, coin, ſilk, &c. from *Spain*, to ſupply our coinage, our manufactures, and our commerce." *Pothier* (*a*), who is generally ſwayed by purer moral ſentiments, combats this doctrine, and inſiſts that the grounds of it are falſe. His principal arguments are, that a man cannot carry on a contraband trade in a foreign country without engaging the ſubjects of that country to commit an offence againſt the laws, which it is their duty to obey; and it is a crime of moral turpitude to engage a man to commit a crime: That a man carrying on commerce in any country, is bound to conform to the laws of that country; and, therefore, to carry on an illicit commerce there, and to engage the ſubjects of that country to aſſiſt him in ſo doing, is againſt good faith, and conſequently a contract made to favour or protect this commerce, is peculiarly unlawful, and can raiſe no obligation.—By way of anſwer to theſe arguments, *Emerigon* (*b*) ſays, that *Pothier* would not have been ſo rigid, if he had conſidered that ſmuggling is a vice common to all commercial nations. That the *Spaniards* and *Engliſh*, in time of peace practice it againſt *France*;

(*a*) *Pothier* h. t. n. 58.—(*b*) Vol. 1. p. 212. 215.

and that the *French*, therefore, have a right, by way of repriſals, to do the ſame towards them, and this he ſays, is ſupported, not by the *authority* of the law, but by the *evaſion* of it.

So that, according to *Emerigon*, the *law* is conformable to *Pothier*'s ſentiments, but the *practice* agreeable to his own. The *morality* of the queſtion is entirely on the ſide of the latter, though *policy*, perhaps, is on the ſide of the former. And yet it is difficult to conceive why, with ſtates, as with individuals, honeſty ſhould not, in all caſes, be deemed the beſt policy. Certain it is, that neither an individual nor a ſtate can, upon any moral principle, juſtify the commiſſion of a crime, in order to obtain ſatisfaction for a wrong done, ſtill leſs for a wrong apprehended.

The law of *England* pays no regard to the revenue laws of other countries;

Be this as it may, the law of *England*, it is ſaid, pays no regard to the revenue laws of other countries. And it muſt be confeſſed that even the legiſlature has, in one inſtance, plainly countenanced a contraband trade with foreign nations. The exception in the ſtat. 19 *G.* II. c. 37, ſ. 3, enabling perſons who carry on a trade with the *Spaniſh* and *Portugueſe* colonies to inſure in the ſame manner as before that act, was evidently made to favour the ſmuggling of bullion from thoſe places by perſons, as *Emerigon* obſerves, who could obtain no bills of lading or other evidence of their cargoes (*a*).

and a policy will not be void, though the trade be a fraud againſt the revenue of a foreign ſtate, and contrary to a *Britiſh* treaty.

And this doctrine has been carried ſo far, that an inſurance upon a voyage, in which it was intended to defraud the revenue of a foreign ſtate, was holden not to be illegal, though fictitious papers were fabricated for the purpoſe of facilitating the fraud (*b*). Nay, it has been holden by a great and eminent judge, whoſe deciſions are juſtly eſteemed to be the higheſt individual authority upon the ſubject of inſurance, that even when the trade inſured is to be carried on by *Britiſh* ſubjects, not only contrary to the laws of a foreign ſtate, but contrary alſo

(*a*) See *Emerigon*'s obſervations on this clauſe of the *Engliſh* ſtatute, vol. I. p. 212.—(*b*) R. *Planche* v. *Fletcher*, *Doug.* 238, *inf.* c. 7. ſ. 3.

to the expreſs proviſions of a treaty, to which *Great Britain* was a party yet, if the inſurer ſubſcribe the policy, with full knowledge of the nature of the trade, the contract will bind him (*a*). This will appear in the following caſe.

Though the intention of the inſured be to carry on a trade with the ſubjects of a foreign ſtate, forbid by the laws of that ſtate; yet it will be lawful; and if known to the inſurer, the policy will bind him.

Lever v. *Fletcher*, at N. P. after Hil. 1780, *Park* 237.

A ſhip was inſured "At and from *London* to *Penſacola* and *Manſhac* in the river *Miſſiſipi*, with liberty to "touch at *Portſmouth* and *Jamaica*."—The ſhip was employed in the uſual trade in the *Miſſiſipi*, and traded at *Little Manſhac*, in the iſland of *New Orleans* in the dominions of *Spain*. *Manſhac*, the place mentioned in the policy, was part of the continent of *North America*, on that ſide of the river, which, by the treaty of *Paris* in 1763, was ſurrendered to *Great Britain*, and is about 37 leagues higher up than *New Orleans*. The loſs was occaſioned by a ſeizure of the ſhip at *Little Manſhac* by the *Spaniſh* governor, as a repriſal for tranſgreſſions alledged to have been committed by a *Britiſh* ſhip in the *Lakes*.—In an action on the policy, it was contended on the part of the defendant, that the policy being on an illicit trade, the contract was void. Lord *Manſfield*, who tried the cauſe, ſaid—"The firſt queſtion is, whether this policy covers the trading on the *Miſſiſipi*, before the ſhip's arrival at *Manſhac*. The trading at *Little Manſhac* is a delay of the voyage, and an increaſe of the riſk. If the policy does not cover this part of the trading, then it is a deviation, and there is an end of the contract. It is very clear what the trade is. Every trading with the ſubjects of *Spain* is illicit by the treaty of *Paris*. The navigation is free to both countries, and the municipal laws of both countries remain. Though ſuch trading be contrary to the laws of *Spain*, yet no country pays attention to the revenue laws of another. Therefore, *if the defendant had, with full knowledge that it was a ſmuggling trade with* Spain, *made the inſurance, then it might be a fair contract between*

(*a*) But though the policy may not be void for this cauſe, yet it has been holden that where a ſhip is ſeized for navigating contrary to the laws of another country, or for not paying cuſtoms, the inſurer ſhall not be anſwerable. Per *Hutchin's* Comm. *Acon.* 2 *Vern.* 176.

the

the parties (*a*).—But the main question for conſideration ſeems to be, whether this trading to *Little Manſhac* was inſured by the policy."—The jury found for the defendant, it may be preſumed, on the ground of deviation.

Sect. 2.

Prohibited Commerce with the Britiſh Colonies.

An inſurance on any commerce contrary to the laws of the dependences of the crown of this kingdom is void.

BUT though the revenue laws of foreign countries are not regarded in *England*, yet, an inſurance on goods which are meant to be imported into, or exported from, any of the dependences of the crown of this kingdom, contrary to the laws in force in thoſe places, would, I conceive, be void: For it would be inconſiſtent with the protection which the ſovereign owes to the ſubordinate ſtate, to encourage any commerce injurious to its intereſts, or to countenance any infraction of thoſe laws, to which the king, as the head of the ſtate, has given his ſanction.

An inſurance on a voyage to the *Eaſt Indies* in contravention of the 9 and 10 *W.* and *M.* c. 44. is void, though the penalties of that ſtatute have been repealed.

Hence it follows that no legal inſurance can be made on any commerce carried on with any of the *Britiſh* colonies, in contravention of the laws made for the regulation of the commerce with thoſe colonies.

The vaſt profits ariſing from the trade to the *Eaſt Indies* have always afforded a ſtrong temptation to private adventurers to engage in a contraband commerce with thoſe parts, notwithſtanding the charter and the acts of Parliament by which the monopoly of that trade has been, from time to time, ſecured to the *Eaſt India* Company. The act by which this was firſt effectually done, was the ſtat. 9 and 10 *W.* III. c. 44. And though this act has been frequently altered and partly repealed by ſubſequent ſtatutes, yet it has never been wholly put an end to; on the contrary, any infringement of it is ſtill illegal: And though ſuch parts of it as inflicted penalties, have been repealed by the ſtat. 33 *G.* III. c. 52; and though this laſt act has provided that no acts,

(*a*) The queſtion here was not whether the contract was fair, *as between the parties*; but whether a court of law in *England* ought to have lent its aid to give effect to an inſurance made to protect a trade carried on, not only againſt the revenue laws of another country, but alſo againſt good faith.

or parts of acts, thereby repealed, shall be pleaded or set up in bar of any action, &c. yet the following case proves that it is competent to underwriters who have subscribed a policy on a ship trading to the *East Indies*, in contravention of this act, to avail themselves of it, in defence to an action on such policy.

A ship being employed to carry convicts stores, &c. to *New South Wales*, the owners obtain a license from the *India* company to sail thither, and from thence to *Bombay*, there to purchase a cargo of cotton, and return to *London*; but stipulate that no other trade shall be carried on. The owners, however, send articles not authorized by the license, with directions to proceed to *Goa*, and sell them there, or at *Bombay*.—An insurance on this ship is void, being effected on a trade undertaken with a view to break in upon the Company's monopoly.

Camden and others v. *Anderson*, 6 T. R. 723. 1 *Bos.* and *Pul.* 272.

The ship *Albemarle* was insured, "At and from *London* to *New South Wales*; and at and from thence to "all ports and places in the *East Indies*, *Persia*, *China*, "or elsewhere; and at and from thence until her safe "arrival back at *London*; with liberty to touch, stay, "and trade at any port or place whatsoever, as well on "this, as on the other side of the *Cape of Good Hope*." An action being brought on this policy, for a loss by capture on the homeward voyage, a special verdict was found, which stated in substance as follows.—The plaintiffs being employed to convey convicts, stores, and provisions, to *New South Wales*, obtained, from the directors of the *India* Company, a licence for the said ship for a voyage to *New South Wales*, &c.; and from thence to *Bombay*, there to purchase cotton, to be legally imported, and sold at the Company's sales in *London*. And the plaintiffs covenanted *that the owner, master, or mariners, should not carry on, or be concerned in, any kind of trade in the* East Indies, *or elsewhere within the limits of the Company's charter*, &c.; and that if they should carry on any such traffic, they should be considered as illicit traders, the goods forfeited, and the persons be liable to the same penalties as unlicensed traders. The plaintiffs ordered the master, after the delivery of the convicts, &c. at *Port Jackson*, to proceed to *Goa*, and there dispose of, or send by other vessels to *Bombay* for sale, copper and other articles, not authorized by the license of the company. The ship sailed with the above unlicensed articles on board; and the plaintiffs wrote to their agent at *Bombay*, informing him of their instructions to the master. The ship, pursuant to the orders of the plaintiffs, sailed from *Port Jackson* to *Goa*, where the master sold the licensed cargo, and then sailed to *Bombay*, from whence, on the 23d of *December* 1792, she sailed for *London*, and was captured in the course of the voyage. The special verdict stated further, that

that all the above facts happened before, and the action was commenced after the making of the ſtat. 33 *G.* III. c. 52, and that the plaintiffs were *Britiſh* ſubjects reſident in *England*. —The ſtat. 33 *G.* III. c. 52, continues to the Company, for a further term, the poſſeſſion of the *Britiſh* territories in *India*, together with their excluſive trade, under certain limitations. The 146th ſection repeals ſo much of the ſtat. 9 and 10 *W.* III. c. 44, and of many other acts (*a*), as inflicted any penalty or forfeiture for illicit trading to the *Eaſt Indies*. The 147th ſection provides, *that this repeal ſhall not extend to any offence committed againſt any of the ſtatutes thereby wholly or in part repealed, before the paſſing of the act.* The 150th ſection, "for obviating any doubts, how far, notwithſtanding ſuch repeal, contracts made, contrary to the reſtrictions contained in the ſaid acts were binding,"—enacts, 'That it ſhall not be lawful for any 'defendant in any action then depending, or thereafter to 'be brought, to plead or ſet up any act ſo repealed, in 'the whole or in part, in bar of ſuch action; but that the 'plaintiff ſhall have the ſame remedy and judgment as if 'the ſaid acts, or parts of acts, ſo repealed, had never been 'made.'—Upon this caſe it was alledged on the part of the defendant, that the 146th ſection of the ſtat. 33 *G.* III. c. 52, repealing ſo much of the former acts as inflicted penalties for illicit trading to *India*, did not extend to any of the proviſions for granting and ſecuring the excluſive trade to the company; and that, by ſeveral acts and parts of acts remaining unrepealed, ſuch excluſive right was reſerved to them, and all others prohibited from invading it; and the proviſo in the 147th ſection, was relied on to ſhew that ſuch repeal ſhould not extend to any offence committed againſt any of the acts thereby wholly or in part repealed, before the paſſing of the act. It was therefore inſiſted, that the policy being effected to protect a trade, which was meant to be carried on contrary to the ſpirit and intention of the exiſting laws, was illegal and void; and that the objection might be taken advantage of in this action, although the right of ſuing for the former penalty was

(*a*) *Vid.* the acts thus repealed enumerated in 6 T. R. 727.

taken

taken away from any common informer.—On the part of the plaintiffs it was replied, that, as all these tranſactions happened before the paſſing of the ſtat. 33 *G.* III. c. 52, the illegality of them could not be taken advantage of in this action, for the 146th ſection repealed all forfeitures and penalties contained in the acts there enumerated againſt ſuch illicit trading; and the 147th ſection merely ſaved the right of ſuch objection, as to offences already committed, *to the company themſelves.* But that the 150th ſection prevented any private ſubject from ſetting up any of the repealed acts or clauſes in bar of any action on any contract made before, as a pretext that ſuch contract was made contrary to the prohibition contained therein.—The court, on full conſideration, determined that the ſtat. 9 and 10 *W.* III. c. 44, was ſtill in force, and that as the policy was effected in contravention of that act, as breaking in upon the monopoly of the company, it was void, and that the defendant was therefore entitled to judgment.—Lord *Kenyon*, in delivering the opinion of the court, ſaid,—"The ground on which my opinion proceeds in this cauſe is, that the ſtat. 9 and 10 *W.* III. has, from the time when it was paſſed down to the preſent moment, been an exiſting law, operating on the rights of the parties. And though ſubſequent acts of parliament have continued the prohibitions enacted by that ſtatute, and though ſome of thoſe acts have been totally repealed, and others repealed in part, the legiſlature appears to have anxiouſly expreſſed their intention in the ſtat. 33 *G.* III. c. 52, that only that part of the ſtat. 9 and 10 *W.* III. c. 44, which is particularly pointed out, ſhould be repealed. If it had been intended to repeal the whole of that act, and that the prohibitions contained in it ſhould be entirely put an end to, it might have been effected by fewer words than are uſed to repeal that part of the act. And on conſidering the whole of this laſt act, it appears to me that the conſtruction inſiſted on by the defendant is the fair one; namely, that the legiſlature meant to repeal the prohibition to lend money to foreign companies, &c. but, by no means had it in contemplation either to abridge, or take away, any

of

of the conſequences of the monopoly given to the *India* company. The words in the different acts ſhew that the ſtat. 9 and 10 *W.* 3, was always conſidered as being in force."—This judgment was afterwards affirmed upon a writ of error in the *Exchequer Chamber* (*a*).

If a foreign ſhip trading to the *Britiſh* ſettlements in *India* under a treaty, violate any of the regulations of ſuch treaty, this will avoid any policy on her.

So, if a foreign ſhip trade to the *Britiſh* ſettlements in *India*, purſuant to a treaty with this country, ſhe muſt conform ſtrictly to the regulations preſcribed by ſuch treaty; otherwiſe ſhe will be ſubject, not only to the penalties preſcribed by law for any violation of the company's monopoly, but alſo render void every policy of inſurance made in this country which attaches at any time during the illicit commerce. And an illegal cargo on board for one hour after a policy attaches, will avoid that policy and diſcharge the underwriters from all ſubſequent reſponſibility. But a legal cargo may be inſured, though purchaſed with the proceeds of an illegal one; and though the ſhip had, by her previous illegal commerce, been ſubjected to ſeizure and confiſcation. Theſe points will be found determined, upon full conſideration, in the following caſe.

But a policy on a legal cargo is not vitiated by the ſhips having *previouſly* acted in contravention of the treaty.

An *American* ſhip at *Bombay* takes in goods for *China* contrary to the *American* treaty. With the proceeds of theſe goods ſhe purchaſes a cargo at *Canton*; for *Hamburgh*.—A policy on the *ſhip at and from Canton* to *Hamburgh* is void, becauſe the illegal cargo was on board part of the time the ſhip remained *at Canton*; and this inſurance will not protect the ſhip on her voyage to *Hamburgh* with another cargo.—But a policy on the *goods* from *Canton* to *Hamburgh* is good, though

An inſurance was made on *goods* on board the *Confederacy*, an *American* ſhip, "At and from *Canton* in *China*, "to *Hamburgh* or *Copenhagen*, with liberty to touch, ſtay, "and trade, at all ports and places whatſoever, particu- "larly at a port in the *Channel*."—This policy was effected for the benefit of *Leſſingwell* and another. There was alſo a policy on *the ſhip* for the ſame voyage. In an action on theſe policies, it appeared that the ſhip was *American* built, the property of *American* ſubjects, commanded by an *American* captain, and furniſhed with the requiſite *French* paſſport. She ſailed with a cargo from *London*, for *Bombay*, where ſhe arrived in *June* 1796, and there diſpoſed of her cargo; and the captain having, by a licence obtained from the governor and council, taken on board a cargo of cotton for *Canton*, ſhe ſailed for that place, where ſhe arrived in *October* 1796. There her cargo was diſpoſed of, and the goods mentioned in the

(*a*) 1 *Pul.* & *Boſ.* 272.

firſt

purchaſed with the proceeds of the illegal cargo. The inſurance on the voyage from *Canton* was legal, though the ſhip had been liable to ſeizure in the voyage from *Bombay* to *Canton*.

Bird v. *Appleton*, 8 T. R. 562.

firſt policy were purchaſed, partly with the proceeds of the cargo from *Bombay*, and ſhipped for *Hamburgh*. The ſhip ſailed for *Hamburgh* in *January* 1797, and was captured by the *French*, carried into *Nantz*, and there condemned on the ground of her having violated ſome of the *French* ordinances.—Theſe facts were ſtated in a ſpecial verdict, in which alſo was ſet forth an article of the treaty between this country and the United States of *America*, referred to in the ſtat. 37 *G.* III. c. 97, by which it is ſtipulated that the citizens of the United States ſhall be permitted to trade with the *Britiſh* territories in the *Eaſt Indies*; but it is expreſsly agreed, "*that the veſſels of the United States ſhall not carry any of the articles exported by them from the ſaid* Britiſh *territories to any port or place, except to ſome port or place in* America, *where the ſame ſhall be unladen*; and that the permiſſion granted by this article is not to extend to allow the veſſels of the *United States* to carry on any part of the coaſting trade of the ſaid *Britiſh* territories." It was alſo ſtated, that the voyage from *London* to *Canton*, and that from *Canton* to *Europe*, were two diſtinct voyages.—In the argument upon this ſpecial verdict, the policy on the *ſhip* was abandoned by the plaintiff's counſel, on this ground, that as this policy, which was "*at* and from *Canton*," attached from the time the ſhip arrived there, including the period of time while the cotton taken in at *Bombay*, in contravention of the above article of the treaty, was ſtill on board; and as the immediate voyage inſured could not be ſevered, the whole muſt be deemed an illegal adventure.—On the policy on the *goods*, ſeveral objections were made on the part of the defendant; —1ſt, That the goods inſured were purchaſed with the proceeds of an illegal cargo, namely, that procured at *Bombay* (it being admitted that the governor's licence to purchaſe it was illegal), and that ſuch an adventure was contaminated by ſuch antecedent illegal traffic.—2dly, That the voyage from *Bombay* to *Canton* was only a part of a larger voyage, out and home, from *London* to *Canton* and from *Canton* to *Europe*; and that as the ſhip, in the courſe of the voyage, traded at *Bombay*, contrary to the treaty between this country and the United States, by not returning

turning directly from *Bombay* to *America*, the whole voyage was illegal.—3dly, That the ſhip was ſeizable, for a violation of the navigation act, in a prior part of the voyage from *Bombay* to *Canton*, and conſequently that the goods inſured were not put on board a proper ſhip, ſuch as the inſured impliedly undertook to provide; and that the right of ſeizure continued at leaſt during the time that the ſhip was on the high ſeas, and until her return home. —4thly, That the ſentence of condemnation by the tribunal at *Nantz* negatived the ſhip's being an *American*.—But the court determined, that the plaintiff was entitled to recover on the policy on the goods.—Lord *Kenyon* ſaid,—"It is now very properly admitted, that the policy on the *ſhip* muſt be abandoned, becauſe during part of the time that the parties intended that the policy ſhould attach, namely, while the ſhip was at *Canton*, there was ſomething illegal in the tranſaction. As to the policy on the *goods*, the arguments urged for the defendant have not convinced me that this contract is illegal, becauſe the goods inſured were purchaſed with the proceeds of a former illegal cargo. If this objection were well founded, it would go to an alarming extent: In deciding on a claim made on a policy of inſurance, it would be neceſſary to examine and ſcrutinize the paſt conduct of the inſured, in order to ſee whether or not, by their former tranſactions in life, they had illegally acquired the funds with which the particular goods inſured were purchaſed. But we cannot enter into conſiderations of that kind; we muſt confine ourſelves to the immediate tranſaction before us. And the voyage homeward *from Canton* being found to be a *ſeparate and diſtinct voyage* from that *to Canton*, the homeward voyage, therefore, cannot be affected by the former outward voyage. After the greateſt attention which I have been able to beſtow on the ſubject, I adhere to the opinion that we gave in the caſe of *Pollard* v. *Bell* (*a*), in which it was eſtabliſhed as a propoſition, that the courts of admiralty are to proceed on the known *jus gentium*, or on the treaties between particular ſtates; that ſuch treaties do not alter the *jus gentium* with reſpect to the reſt of the world;

(*a*) *Inf.* c. 8. § 4.

but,

but, as between thoſe particular ſtates, they are conſidered as engrafted on the *jus gentium*; and that one ſtate has no authority, by any ordinance of its own, to vary the general law of nations, as to other ſtates. But the ground of the ſentence of the *French* court of Admiralty, in this caſe, is the not conforming to a *French* ordinance in a matter which is neither required by the law of nations, or by the treaty between *France* and *America*, and it is found by the verdict that all the requiſites of that treaty were complied with." Mr. Juſtice *Lawrence* ſaid,—"With regard to the firſt objection made on the part of the defendant, in ſuch a caſe as the preſent, we cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchaſe of goods: If the money were obtained by robbery on the highway, and inveſted in the purchaſe of a cargo, I do not know why that cargo may not be legally inſured. In order to render the inſurance illegal, the illegality ſhould exiſt during the courſe of the voyage inſured: Nor do I think that the next objection, that the plaintiffs cannot recover, becauſe the ſhip was liable to ſeizure, is well founded. Here the illegallity commenced by the captain taking on board a cargo at *Bombay*, in order to carry it to *Canton* for ſale. But the doctrine relied upon by the defendant is perfectly new, that the inſured cannot recover on the policy againſt the underwriters, becauſe the ſhip, in a prior voyage, had been guilty of ſome tranſgreſſion, for which ſhe was liable to be ſeized. That is not a riſk within the policy. If the ſhip had been ſeized for this cauſe during the voyage inſured, the underwriters would not have been liable; they are only liable for riſks in the courſe of the voyage inſured. Then the only remaining queſtion is, whether or not it were decided by the foreign ſentence, that the ſhip was not an *American*. The attempt on the part of the defendant here, is not ſo much to diſpute the authority of the caſe of *Pollard* v. *Bell*, as its application to the caſe before us. However, I am of opinion, that on the whole, we muſt conſider that the foundation of this ſentence of condemnation, was the violation of *French* ordinances only, and conſequently that the caſe of *Pollard* v. *Bell*, is a direct authority for the preſent."

Sect. 3.

Contraband of War.

Vid. ſup. ch. 2. ſ. 1.

IN time of war, it is the duty of thoſe who are not engaged in it, and who profeſs to be neutral, to obſerve an exact impartiality between the contending parties, and to afford no aſſiſtance to either, to the prejudice of the other. *Pacem utrique parti quod medios deceat amicos, optent, bello ſe non interponant* (*a*). To what extent neutrals may trade with a belligerent power, is a queſtion upon which there have always been great diſputes; ſome contending for the rigour of war, and others for a freedom of commerce, which, by the law of nations, as they ſay, one ſtate may carry on with another. It muſt be owned, that in the deciſion of this queſtion, much frequently depends on the power of the party, whether belligerent or neutral, who contends for the one principle or the other. Breaches of neutrality are often ſuffered to paſs unnoticed, becauſe the party who ſuffers by them, finds it neceſſary to diſſemble his reſentment, leſt he ſhould draw new enemies on himſelf; and neutrals often ſubmit to great outrages rather than involve themſelves in war. There are, however, certain principles, which, though occaſionally violated, are univerſally reſpected as public law. That law has pretty accurately defined what ſhall be deemed contraband of war.

The obligations of neutrality.

Some articles of commerce, are of uſe only in war; theſe are the *belli inſtrumenta*, viz. arms, ammunition, and other warlike ſtores; ſome are of no uſe in war, as thoſe that ſerve only for pleaſure, and the uſes of common life; and ſome are uſeful both in peace and war, as money, proviſions, horſes, ſhips, naval ſtores, &c.—The firſt of theſe, namely, warlike ſtores, when ſent to either party, are always deemed contraband by the other; and by the

What articles are contraband.

(*a*) *Liv.* lib. 25. c. 48. Vid. *Vatel* Droit des Gens, liv. 3. ch. 7. n. 103, 104.

law

law of nations, are ſubject to capture and confiſcation, in whatever veſſel they are found; this ſpecies of commerce with an enemy, being inconſiſtent with neutrality (*a*). —*Locennius* extends the prohibition even to proviſions (*b*). But, the law of nations, as at preſent underſtood, ſeems to confine that reſtriction to places beſieged or blockaded (*c*).

Not only arms, powder, ball, and other ammunition, but alſo horſes and furniture, pitch, tar, ſails, hemp and cordage, maſts, yards, and all other neceſſaries for the building or equipment of ſhips, are generally conſidered as contraband, by the law of nations (*d*). What articles ſhall or ſhall not be deemed contraband, as between particular ſtates, are often regulated and aſcertained by particular treaties between thoſe ſtates.

Commerce with places beſieged.

Beſide theſe reſtrictions, there is another by which all commerce is abſolutely prohibited with a town or place beſieged, inveſted, or even blockaded; for the beſiegers have, by the law of nations, a right to prevent all communication with the place inveſted, and to treat as an enemy, whoever attempts to enter, or carry any thing into it, without permiſſion (*e*). And egreſs is as much a breach of a blockade as ingreſs, if it be done frudulently.

But the power which undertakes a blockade, ought immediately to notify this to all neutral ſtates. The effect of

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(*a*) In hoſtium eſt partibus qui ad bellum neceſſaria hoſti adminiſtrat. *Grot.* lib. 3. c. 1. ſ. 5.—(*b*) De jure maritimo, lib. 1, c. 4. n. 9.—(*c*) *Valin*, tit. *Des priſes*, art. 11. p. 264.—The penſionary *De Witt*, in his letter of the 4th of January 1654, agrees that it would be contrary to the law of nations to reſtrain neutral nations from carrying corn and proviſions to the enemy's country; but he ſays that they may be reſtrained from carrying there any of the neceſſaries for equipping ſhips of war. But Queen *Elizabeth*, in 1599, would not permit the *Danes* or *Poles* to carry proviſions to *Spain*, declaring that "by the rights of War, it was permitted to reduce an enemy by famine, to ſeek for peace."—Vid. *Grot.* lib. 3. c. 1. ſ. 5. *Vattel* Droit des Gens, liv. 3. c. 7. n. 112.—(*d*) *Vattel* liv. 3. c. 7. n. 112. (*e*) *Vattel* liv. 3. c. 7. n. 117. *Grot.* l. 3. c. 1. ſ. 5. *Bynk.* quæſt. jur. pub. l. 1. c. 11.

ſuch

ſuch a notification is, to include all the individuals of thoſe ſtates; becauſe it is preſumed that thoſe ſtates communicate the information to their ſubjects, whoſe intereſts they are bound to protect: Therefore no neutral ſubject, after ſuch notification, can be allowed to aver ignorance of ſuch blockade.—There is this difference between a blockade thus regularly notified, and a blockade *de facto*, that, in the former, the act of ſailing to the blockaded place amounts, to a breach of the blockade, and ſubjects the neutral ſhip to capture and confiſcation; whereas, in the caſe of a blockade *de facto*, the ignorance of the party may be received as an excuſe for ſailing to the place blockaded (*a*).

Not only a ſingle port, but a number of ports, and even a great extent of coaſt may be blockaded.—In the month of *March* 1799, the *Britiſh* government notified to all neutral powers, that the ports of *Holland* were all inveſted and blockaded by the *Britiſh* forces, and that every veſſel, of whatever flag, every cargo, and every bottom, attempting to enter them, would become forfeited by the law of nations, as attempting to carry ſuccour to the beſieged.—It muſt be admitted, that in no former war had the blockading ſyſtem been puſhed to this extent: But this has been, not for want of *right*, but for want of *power*. If a ſingle port may be blockaded by a ſingle ſquadron, which has never yet been diſputed, a number of ſquadrons may blockade a certain extent of coaſt: And if a country poſſeſs the power and means, and will incur the expence and hazard, of covering the whole extent of an enemy's coaſt, it becomes entitled, upon the ſame principle, to the ſame exemption from neutral interference, as if, with a ſingle diviſion, it inveſted a ſingle fortreſs.

The right of viſiting and ſearching neutrals.

But it would be impoſſible to prevent the tranſport of contraband goods, if neutral veſſels might not be ſearched at ſea; and hence has ariſen the right of ſearch aſſumed by all belligerent powers, though formerly reſiſted by ſuch

(*a*) See the judgments of Sir *William Scott*, in the caſes of breach of blockade in *Robinſon*'s Reports of Admiralty Caſes, vol. 2, p. 109. 111. 116. 124. 128. 131, &c.

ſtates as were powerful enough to protect their ſubjects in their refuſal. But it ſeems now to be ſettled, that a neutral ſhip which ſhould refuſe to ſubmit to ſuch ſearch, or to produce her papers, would be ſubject to condemnation for that cauſe alone (*a*). To prevent, however, the inconvenience, vexation, and abuſe ariſing from an unreſtrained licenſe to ſearch all neutral ſhips, the manner of doing it is uſually regulated by the different maritime ſtates, in their treaties of navigation and commerce with each other; and credit is uſually given to the bills of lading, invoices, clearances, and other papers on board, unleſs fraud appear, or there be a reaſonable ground to ſuſpect it. We ſhall have occaſion to conſider this ſubject more at large hereafter (*b*).

The inſurance of warlike ſtores ſent to the King's enemies is criminal and void.

The ſending of any of the articles denominated *belli inſtrumenta*, or any other ſuccour, by a *Britiſh* ſubject in time of war, to the King's enemies, amounts to the offence of high treaſon (*c*). It is needleſs to add, that the inſurance of ſuch criminal traffic by a *Britiſh* ſubject, would be void. And though the ſending of ſuch goods to the King's enemies, by the ſubjects of a neutral power, would, in them, be no offence againſt the law of *England*; yet the inſurance of them, in this country, would be, not only void, but highly criminal in every perſon concerned in it.

An inſurance on any trade carried on in contravention of an embargo laid by the King, is void.

Another reſtriction on commerce ariſes ſometimes from embargoes. The King, by his prerogative, has the power of iſſuing proclamations, which, when they are grounded upon, or are meant to enforce, the exiſting laws of the realm, have a binding force (*d*). In time of war, when the ſafety of the nation is concerned, the King may, by his proclamation, lay an embargo on all ſhipping, and ſhut up all or any of the ports in his dominions, either generally, or for the particular purpoſe of ſtopping the export of proviſions, or other things (*e*); and any trade carried on, in contravention of ſuch proclamation, is illegal, and

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(*a*) *Vattel*, liv. 3. ch. 7. n. 114. *Valin*, tit. des priſes, art. 11, p. 270.—(*b*) Vid. *inf.* c. 8, § 4, n. 3.—(*c*) Vid. 4 *Bl.* Com. 82, 83.—(*d*) 3 Inſt. 162.—(*e*) Vid. 1 *Bl.* Com. 270, 4 *Mod.* 177. 179.

conſequently an inſurance upon ſuch trade, even when carried on by a neutral, is void.

A neutral ſhip obtains a cargo of proviſions in *Ireland*, after an embargo laid, and takes clearances for a neutral country, but ſails for an enemy's port, and is taken.—This, being an illegal traffic, the policy is void.

D'Imada v. *Motteux*, B. R. M. 25 *G.* 3. *Park* 234.

Thus, after an embargo had been laid on all ſhips laden, or to be laden, in *Ireland*, with any ſort of *proviſions*, an inſurance was made on the *Bella Juditta*, a *Venetian* ſhip, the property of a ſubject of *Venice*, "At and from *London* to the *Grenades*, with liberty to touch at *Cork* and *Madeira* to load."—The ſhip ſailed from *London* to *Cork*, and there took in a cargo of *proviſions*, the property of *French ſubjects*, the enemies of *Great Britain*; and having obtained clearances and bills of lading for *Madeira*, ſhe ſailed to that iſland, where ſhe was neither to unload any part of her cargo, nor to take any goods on board; but where ſhe took clearances and bills of lading for *St. Thomas*'s, a *Daniſh* iſland, whither ſhe was not deſtined, but only to *Grenada*, then in the poſſeſſion of the *French*, and on her voyage thither was captured by an *Engliſh* man of war, and the cargo condemned by the Vice Admiralty Court of *Barbadoes*, as enemy's property; and the ſhip ordered to be reſtored, but *without freight*, or damages for the capture, becauſe ſhe was engaged in an illicit commerce.—An action was brought on the policy, to recover for this loſs of freight and damages occaſioned by the capture.—But the court held that this voyage was a breach of the embargo; that it was a fraud to go to an enemy's port, under colour of going to a neutral port; and, conſequently, that the inſurance was illegal and void.—Lord *Mansfield* ſaid,—"Is not this a breach of the embargo? The King, in time of war, has an undoubted right to lay an embargo: In time of peace it is another queſtion. Every power lays them on. If the ſhip had only been carrying goods of an enemy on a voyage lawful for her to perform, ſhe might have been entitled to freight. But here the ſentence ſays ſhe ſhall not: And why? Becauſe ſhe has done a wrong thing. It is a fraud; for under colour of a neutral port, ſhe goes to an enemy's port. She breaks an embargo. What the conſequence of that is, has not yet been ſettled: But, to break an embargo is undoubtedly a criminal act; and wherever a man makes an illegal con-

tract, this court will not lend him their assistance to enforce it (*a*).

If all intercourse with a *British* colony be prohibited, an insurance on goods intended to be carried thither is illegal and void.

So, when all intercourse with the *American* colonies was prohibited by act of parliament, the following case will shew that a commerce carried on with such places, during the continuance of this prohibition, contrary to the provisions of the statute, was illegal; and an insurance on the trade void, even though such commerce had been countenanced by government, and encouraged by the King's officers.

Johnston v. *Sutton*, Doug. 254.

An insurance was made on goods on board the ship *Venus*, lost or not lost; "At and from *London* to *New York*; warranted to depart with convoy from the *Channel*, for the voyage."—The ship was cleared for *Halifax* and *New York*. She had *provisions* on board, which she had a license to carry to *New York*, under a proviso in the stat. 16 G. III, c. 5, § 1, which prohibited all commerce with the province of *New York*, among others, and confiscated all ships and their cargoes which should be found trading, or going to, or coming from, trading with them. But there was a proviso in the act, (§ 2.) excepting 'ships laden 'with provisions for the use of his Majesty's fleets or garrisons, or the inhabitants of any town possessed by his 'Majesty's troops, provided the master should produce a 'licence, specifying the voyage, &c. and the quantity and 'species of provisions; but that goods not licensed found 'on board such ships should be forfeited.'—But one half of the cargo, including the goods insured, was not licensed, and was not calculated for the *Halifax* market, but for *New York*. There had been a proclamation by Sir *William Howe*, the commander in chief, to allow the entry of un-

(*a*) There seems to be some inaccuracy in the report of this case. It states a *general* embargo on all ships laden with provisions in *Ireland*; and yet it states that the *Bella Juditta* took in a loading of provisions at *Cork*, from whence she took clearances and bills of lading for *Madeira*, as if that might have been legally done. It is probable that the embargo was confined to provisions meant to be exported to any of the possessions of the enemy.

licensed

licenſed goods at *New York*; and though there were bonds uſually given at the cuſtom-houſe here, by which the captain engaged to carry the goods to *Halifax*, thoſe bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpoſe at *New York*, declaring that they were landed there. The commander in chief had no authority under the act of parliament to iſſue ſuch proclamation, or to permit the exportation of unlicenſed goods.—The ſhip was taken in her paſſage to *New York* by an *American* privateer.—In an action on the policy, there was a verdict for the plaintiff. But, upon a motion for a new trial, the court determined that as this trade was expreſsly prohibited, the inſurance was void, and the plaintiff could not recover.—Lord *Mansfield* ſaid;—"The whole of the plaintiff's caſe goes on an eſtabliſhed practice, directly againſt an act of parliament. If the inſurer did not know that the goods were unlicenſed, the objection is fair as between the parties. If he did, he would not deſerve to be favoured. But, however that may be, it was illegal to ſend goods to *New York*, and, *in pari delicto, potior eſt conditio defendentis.*"

It is impoſſible to bring this within the caſes that have been cited (*a*); becauſe here there was a direct contravention of the law of the land.

In the caſe of *Giſt* v. *Maſon*, which we have already noticed (*b*), the inſurance was upon a cargo of proviſions ſent by the inſured from *Ireland* to ſome of the *Weſt-India* Iſlands, which had been captured by the *French* in the *American* war, where the inſured had property, and which were conſtantly ſupplied with proviſions, by means of neutral veſſels, though they were in the hands of the enemy.—In an action by an underwriter againſt the inſured to recover the premium, the illegality of the commerce was objected.—Lord *Mansfield* being of opinion

An inſurance cannot be made on proviſions, ſent in a neutral ſhip to a *Britiſh* colony, while in the hands of the enemy.

Giſt v. *Maſon*, 1 T. R 84.

(*a*) Theſe were *Planché* v. *Fletcher*, *Doug.* 253. *inf.* and *Burton* v. *Thompſon*, 2 *Bur.* 664. This laſt caſe was cited to ſhew that a court will not ſet aſide a verdict, which was agreeable to juſtice, merely becauſe it was againſt the ſtrict law.—(*b*) *Sup.* 34.

that the policy was not illegal on the face of it, directed a verdict for the plaintiff; and the court afterwards refused to grant a new trial to let the defendant in, to shew by evidence that the insurance was upon provisions supplied to the enemy.

Sect. 4.

Commerce with the Enemy.

No *British* subject can trade with the enemy without a licence.

BY the common law of *England*, no *British* subject can legally trade with an enemy, without the King's licence. The reason is, that war puts every individual of the respective belligerent governments into a state of mutual hostility (*a*); and there is no such thing as a war for arms, and a peace for commerce. In that state, all treaties, civil contracts, and rights of property, are put an end to. Trading, therefore, which supposes the existence of civil relations, the rights of property, and the obligation of contracts, is necessarily contradictory to a state of war. Besides, it is criminal in a subject to aid and comfort the enemy; and trading not only affords that aid in the most effectual manner, by enriching the enemy's country, and increasing their resources, but also facilitates the means of carrying on a traiterous correspondence, which may more than counterbalance any advantage likely to accrue from such trading (*b*). This being so, it follows that every contract of insurance against the risks attendant on such trading, must be illegal.

(*a*) Quand le conducteur de l'état, le souverain, declare la guerre à une autre souverain, on entend que la nation entiere déclare la guerre à une autre nation. Car le souverain represente la nation, et agit au nom de la société entiere, et les nations n'ont à faire les unes aux autres qu'en corps dans leur qualité de nations. Ces deux nations sont donc ennemis; et tous les sujets de l'un sont ennemis de tous les sujets de l'autre. L'usage est ici conforme aux principes. *Vattel*, liv. 3. c. 5. n. 70.—(*b*) Vid. the arguments and authorities in support of this doctrine, in the very learned and eloquent judgment of Sir *William Scott*, in the case of the *Hoop*, *Rob.* Adm. Rep. 201.

Till

Goods bought of the enemy cannot be inſured.

Till lately, however, as we had occaſion to obſerve in the laſt chapter, the general opinion, ſupported by conſtant practice, was, that in *England*, not merely the goods of *Britiſh* ſubjects purchaſed of the enemy, but even the goods of the enemy themſelves, might be legally inſured, and the legiſlature has frequently found it expedient, in times of war, to interpoſe its authority to reſtrain ſuch inſurances (*a*). The caſes of *Brandon* v. *Neſbitt*, and *Briſtow* v. *Towers* (*b*) have gone the length, however, of diſabling an alien enemy, or any other on his behalf, from maintaining an action on a policy on the property of ſuch alien enemy, at leaſt during the continuance of hoſtilities. But the queſtion ſtill remained, whether a *Britiſh* ſubject might inſure goods purchaſed by him in the enemy's country, when the two following caſes ariſing out of the ſame tranſaction, drew that queſtion into a full diſcuſſion, which has terminated in ſetting it finally at reſt, upon the ſure foundation of law.

Goods the produce of *Holland* are purchaſed there during hoſtilities between *Great Britain* and *Holland* for a *Britiſh* ſubject, and ſhipped for *England*.—It was determined that ſuch goods might be legally inſured in *England*.

Belt v. *Gilſon*, 1 *Pul.* & *Boſ.* 345.

The firſt of theſe caſes was an inſurance on goods on board the *Elizabeth*, from *Rotterdam* to *Hull*.—In an action on this policy, brought in the court of *Common Pleas*, to recover for a total loſs by capture, there was a verdict for the plaintiff, ſubject to the opinion of the court, on a caſe which ſtated in ſubſtance,—"That the *Elizabeth* was a neutral ſhip, bound on the voyage inſured; that ſhe was captured by the *French*, and the goods loſt; that the plaintiffs had on board a quantity of madder purchaſed for them, and on their account, at *Rotterdam*, by their agent, a *Britiſh* ſubject reſident there; that at the time the goods were purchaſed and ſhipped, and alſo at the time the inſurance was effected, open hoſtilities exiſted between *Great Britain* and *Holland*; that during all that time, it was the conſtant practice to enter goods at the Cuſtom-Houſe here, direct from *Holland*, and this was never impeded, though the officer knew from whence they came, as he always enquired whether they were alien's goods, on account of the alien duty."—Upon this caſe it was inſiſted, on the part of the defendant, that this inſurance

(*a*) Vid. ſup. 30.—(*b*) *Sup.* 36, 37.

was illegal, becauſe a *Britiſh* ſubject could not lawfully purchaſe goods from, or carry on any commerce with, the enemies of the King. But the court (*a*) held that the inſurance was legal.—Mr. Juſtice *Buller* ſaid,—"The queſtion is, whether this policy on goods, purchaſed ſince the commencement of hoſtilities, and ſhipped at *Rotterdam*, be legal or not. It is clear that this is not an inſurance on enemy's property, and therefore we have nothing to do with that conſideration here. The caſe ſtates that the goods were purchaſed for the plaintiff at *Rotterdam* by his agent. But whoſe goods they were before, is not mentioned. They might have been the property of neutrals, or of an *Engliſhman*. Suppoſe an *Engliſhman*, at the commencement of hoſtilities, to have goods in an enemy's country; may he not bring them away? But I will go one ſtep farther: I will ſuppoſe that the party had ſtolen theſe goods, and that, being in poſſeſſion of them at the time of the policy made, he wants to bring them home. The underwriter will have no right to go into the ſtate of the property previous to the time when he inſured. Suppoſe certain requiſites to have been neceſſary, by the law of *Holland*, to make a good ſale there, ſhall the underwriter ſay that the goods were not ſold according to the law of *Holland?* Or, if they were ſeized by a pirate, and ſold by him to the plaintiff; ſhall the underwriter ſet up that as a defence? Whether the goods were improperly ſold to him or not, provided he has paid the value, he is intereſted to the amount of them; and ſhall he not inſure them? The underwriter cannot be permitted to go beyond the time when the goods were ſhipped. If *Britiſh* ſubjects have goods in the enemy's country, it is moſt clearly for the intereſt of this country that they ſhould be able to bring them home."—Mr. Juſtice *Heath* concurred in this opinion, and ſaid,—"It is clearly competent to a *Britiſh* ſubject to reſide in *Holland* in time of peace, or to have a factor there. If ſo, may he not, on the commencement of hoſtilities, bring home his property? It has been objected, in this caſe, that the goods were purchaſed ſince the commencement

(*a*) Lord C. J. *Eyre* was abſent.

of

of hoſtilities; but we muſt remember that a man cannot always remit his effects to another country in ſpecie. He muſt convert them into ſuch goods as are merchandizable in the place in which he wiſhes to remit them. It is not ſaid that theſe parties carried on trade, but only that they bought theſe particular goods. Steering clear, therefore, of the general queſtion, whether a *Britiſh* ſubject may carry on trade in an enemy's country, in time of war, I think the plaintiff has a right to recover."—Mr. Juſtice *Rooke* thought that the facts of the caſe were ſtated in ſo general a way, that they imported a general trading with an enemy's country; and therefore he conceived that he could not decide this caſe, without giving an opinion on the general queſtion, which he thought unneceſſary, as it would not affect the judgment of the court, the other two judges having declared their opinions in favour of the plaintiffs.

The other caſe, which was on the ſame policy, was tried in the court of Common Pleas, and there was a verdict for the plaintiffs. A bill of exceptions was tendered on the part of the underwriter, and allowed, upon which the ſame facts appeared as in the former caſe. — The cauſe was removed by writ of error into the *King's Bench*, and after two arguments, firſt by common lawyers, and again by civilians, the court, after time taken for conſideration, were unanimouſly of opinion that a *Britiſh* ſubject's trading with an enemy, without the King's licence, was illegal; and that the inſured, therefore, could not recover on the policy.

But it was afterwards determined, upon great conſideration, that ſuch trading was illegal, and the inſurance made to protect it, void.

Potts v. *Bell*, 8 T. R. 548.

Sect. 5.

The Wages and Effects of the Maſter and Mariners.

IT ſeems to be the policy of all maritime ſtates to uſe every precaution to prevent the deſertion of the ſeamen, to intereſt them in the preſervation of the ſhip, and to incite them to the moſt vigorous exertions in times of danger. With this view the ſtat. 8 *G.* I. c. 27. § 7. was

Seamen are not to be paid more than a moiety of their wages abroad.

was made, to reſtrain maſters and owners of ſhips from paying the ſeamen, beyond the ſeas, above one moiety of the wages due to them, at the time of ſuch payment, before the ſhip's return to *Great Britain* or *Ireland*.

Nor can the ſeamen inſure their wages, or any thing in nature of wages.

The ſame wiſe policy has alſo prohibited the inſurance of ſeamen's wages in all maritime countries; and by the law of *England*, ſuch inſurance is unqueſtionably illegal (*a*), and the following caſe ſhews that a ſeaman is not permitted to inſure any thing in nature of wages.

A mate of a ſlave ſhip, who is to have ſome privilege ſlaves, cannot inſure them, being in the nature of wages; and therefore he cannot recover againſt his agent for negligence in not procuring ſuch inſurance to be effected.

Webſter v. *De Tuſſet*, 7 T. R. 157.

An action was brought againſt an agent for neglecting to make an inſurance according to inſtructions, and it appeared at the trial, that the plaintiff had been hired to go as mate in a ſhip from the coaſt of *Africa* to the *Havannah*, for which he was to receive 5 l. per month, as wages, and three privilege ſlaves free of expence. The ſhip was loſt on her voyage, and the plaintiff proved that he thereby ſuſtained a loſs of 150 l., reckoning 39 l. 5 s. for his cheſt and clothes, and the reſt for the value of the ſlaves.—It was objected that the plaintiff could not recover the value of the ſlaves, they being in the nature of wages, and, therefore, not the ſubject of a legal inſurance. A verdict for the plaintiff was taken, however, for 150 l., with liberty to the defendant to move to reduce the damages to 39 l. 5 s., the value of the cheſt and clothes.—Upon this motion being made, the court were clearly of opinion, that the ſlaves were not the proper ſubject of an inſurance; and that though, in point of fact, theſe ſlaves were frequently inſured, and the loſs always paid by the underwriters, without diſputing the queſtion;—yet the court were of opinion, that as the objection was made, the plaintiff could not recover in this action more than he could have recovered in an action againſt the underwriters. The verdict was therefore reduced to 39 l. 5 s.

The following caſe reported by *Emerigon* (*b*) ſeems to have been decided upon ſound principles.—A ſeaman, who was engaged for a voyage, while the ſhip was in a foreign harbour, threatened to leave her, unleſs his wages already earned were ſecured to him. The captain gave him a note by which he undertook *to pay him his wages then due*

(*a*) Vid. 1 Mag. 18. Adm. in *Carter* v. *Boehm*, 3 *Bur.* 1912. 1 Bl. 594.—(*b*) *Emerig.* tom 1. p. 236.

to

to him at all events. The ſhip was afterwards taken.—The ſeaman, on his return to *France*, ſued the captain on his undertaking. The captain alledged that this undertaking was againſt law, and that he only gave it to prevent the ſeaman from deſerting the ſhip.—This was conſidered as a juſt and proper anſwer to the ſeaman's demand, and his ſuit was diſmiſſed with coſts.

But although the ſeamen are not permitted to inſure their wages, as ſuch; yet, in moſt foreign countries, they are allowed to inſure ſuch goods as they purchaſe with the wages they receive abroad; and there ſeems to be no reaſon why they ſhould not have the ſame indulgence in this country, as the reſtraint is meant only to apply to ſuch wages as are not due till the voyage is entirely finiſhed (*a*).

But they may inſure goods purchaſed abroad with their wages.

Though the policy of the law tends to reſtrain all inſurances whereby the intereſt of the ſeamen in the care and preſervation of the ſhip may be leſſened, yet the captain is allowed to inſure goods which he has on board, or his ſhare in the ſhip, if he be a part owner (*b*).—Upon this principle it has been determined, that the governor of a fort in a foreign ſettlement, in time of war, may inſure the fort for twelve months, againſt its being taken by a foreign enemy (*c*).

The captain may inſure his goods on board, or his ſhare in the ſhip.

Upon the ſame principle, a governor may inſure a fort againſt capture by an enemy.

Sect. 6.

Freight.

BY the law of *France*, always watchful to prevent the contract of inſurance from ever becoming lucrative to the inſured, the inſurance of freight, not actually earned, is prohibited. One reaſon aſſigned for this is, that the maſter may be thereby rendered more careful in the preſervation of the ſhip and cargo; another is, that freight is

In *France* the inſurance of freight is prohibited, except freight already earned.

(*a*) Vid. *Emerig.* tom 1. p. 235.—(*b*) *Emerig.* tom 1. p. 236.—(*c*) Per Lord *Mansfield* in *Carter* v. *Boehm*, 3 *Bur.* 1905, 1 *Bl.* 593. *Inf.* c. 9, ſ. 2.

of

of the nature of profit, and till it be acquired, the owner of the ſhip has not an inſurable intereſt in it. But, by a declaration of the *French* government in 1779, freight, *actually earned*, was permitted to be inſured; and it was provided, that in caſe of loſs, it ſhould not be included in the abandonment of the ſhip, unleſs it were expreſsly ſo ſtipulated in the policy. But freight, though actually earned, can in *France* be inſured only by the *freighter*, when he agrees to pay the freight at all events. It is, in that caſe, an expence which he muſt loſe, if the ſhip ſhould be loſt without completing her voyage, and therefore a fair ſubject of inſurance (*a*).

In England, the freight as well as the ſhip may be inſured.

But the mere inſurance of a ſhip, let out on freight, would afford the owner but an inadequate protection, where the loſs of freight follows that of the ſhip. In *England*, therefore, the freight, as well as the ſhip, may be legally inſured. And this is conformable to the practice in *Italy* (*b*).

But the inſured can only recover for a loſs of freight, where the riſk on freight has been commenced.

To intitle the owner, however, to recover for a loſs, on a policy on freight, it muſt appear that, before the loſs, the owner's right to freight had commenced; that is, that the ſhip had actually begun to earn freight, for till then the riſk on freight does not commence. Therefore, if the cargo be ready to be put on board, but the ſhip is loſt while preparing for the voyage, the inſured ſhall not be entitled to recover for the loſs of freight (*c*). But if part of the cargo be ſhipped, there is then an inception of the riſk on freight, and the inſured, upon a valued policy, ſhall recover for the whole freight (*d*). So, if the ſhip ſail on her voyage to the port where ſhe is to take in her cargo, this ſhall be a commencement of the riſk on the freight, and if the ſhip be loſt before her arrival at her port of loading, the inſurer on the freight is liable (*e*). See this ſubject more fully treated, poſt. ch. 6. § 6.

(*a*) Vid. *Le Guidon*, ch. 15. art. 1. *Valin*, ſur art. 15. p. 58. *Pothier*, h. t. n. 36. *Emerig.* tom. 1. p. 225.—(*b*) *Roccus*, not. 96. (*c*) Per *Lee*, C. J. in *Tonge* v. *Watts*, inf. c. 6. § 6.—(*d*) Per Lord *Kenyon*, in *Montgomery* v. *Eggington*, inf. c. 6, § 6.—(*e*) *R. Thompſon* v. *Taylor*, inf. c. 6, § 6.

Sect. 7.

Slaves.

Slaves formerly insured as goods.

THERE is ſomething extremely offenſive to humanity in the idea of any part of the human ſpecies becoming property, and a ſubject of commerce, capable of being bought and ſold like beaſts of burthen. And yet it is to be lamented that this traffic has exiſted in all ages, even amongſt the moſt poliſhed nations of the world, and where moral refinements were the moſt highly cultivated.

For upwards of two centuries, a commerce in negro ſlaves has been carried on by the ſeveral maritime ſtates of *Europe*, for the purpoſe of ſupplying their colonies in *America* and the *Weſt Indies* with labourers. The unfortunate objects of this cruel traffic were formerly too much conſidered as mere merchandize. The merchant inſured them as ſuch, and, with us, till lately, he was protected by the policy againſt any loſs ſuſtained in the voyage, even by mortality, if it could, by any conſtruction, be attributed to any of the perils mentioned in the policy. At length, however, the *Britiſh* legiſlature, roufed by the calls of humanity, has interpoſed; and though it has not been thought wiſe at once to aboliſh this trade altogether, it has been ſubjected to many wholeſome reſtraints, not only in the manner of carrying it on, but alſo in the inſurance of it. The object of theſe regulations is, to intereſt all perſons concerned in the tranſporting of ſlaves from *Africa* to the *Weſt Indies*, in their health and preſervation; and nothing can more conduce to that end, than reſtraining the inſurance of them againſt loſs by mortality, or, indeed, againſt any loſs not ariſing from inevitable accidents and misfortunes. Theſe regulations will be particularly mentioned hereafter, when we come to treat of the riſks againſt which inſurances may be made *(a)*.

The inſured was protected even from loſſes by mortality.

How this trade and the inſurance of it, are now regulated.

(a) Vid. inf. ch. 6, § 1. Vid. alſo ch. 12, § 1.

Sect. 8.

Profit.

How Insurable abroad.

IN *Italy*, a merchant is permitted to insure the profit he expects to derive from the goods he exports (*a*).—The *French* ordinance of the marine (*b*), on the contrary, adopting the rule of the *Roman* law, "*Detrimenti, non lucri, sit præstatio* (*c*)," prohibits the insurance of profit. Nothing, indeed, in *France*, seems to be deemed a proper subject of insurance, but the ship, and such effects on board as are the absolute property of the insured, at the commencement of the risk. Profit, therefore, being precarious, and depending upon the uncertain event of future traffic, does not come within that description (*d*).

How in *England*.

In *England*, though it is not unusual to insure profit, *eo nomine*, the question whether this be a proper subject of insurance, has never yet come under solemn discussion.

Grant v. *Parkinson*, *Park* 267.

In the case of *Grant* v. *Parkinson* (*e*), which we shall have occasion hereafter to mention more particularly, an insurance was made *on the ship, and goods on board*; and this, in the policy, was declared to be "*on the profit expected to arise on the cargo*, in the event of the ship's safe arrival." It was proved at the trial, that the plaintiff had a reasonable expectation of profit, upon a cargo of molasses, which was to be used by him in the making of spruce beer, to supply the army in *Canada*, for which he had a contract with government; and this was held to be an insurable interest.

But it is to be remembered that this was not an insurance upon profit, *eo nomine*; but upon the *ship and cargo*, with a declaration in the policy, which shewed, that the sole interest of the insured was in the profit expected to arise to him from the use he meant to make of the

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(*a*) *Roccus*, h. t. not. 31.—(*b*) *Tit.* Assurance, art. 15.—(*c*) *Dig.* lib. 14, tit. 2, de lege Rhodia, de jactu, § 4.—(*d*) Vid. *Emerig.* tom. 1, p. 232.—(*e*) *Inf.* c. 4, § 2.—

cargo,

cargo. One principal ground of the deciſion was, that this was a valued policy, in which, provided the object of the contract be not a wager, any qualified property in the goods inſured, or any reaſonable expectation of profit or advantage to ariſe therefrom, will amount to an inſurable intereſt (*a*). Had the policy been an open one, it would have been extremely difficult to form any juſt eſtimate of the loſs. The inſured might have calculated it upon the probable gain which he might have made of the molaſſes, when employed in the making of ſpruce beer, and charged to government according to his contract. The underwriter might think, and perhaps with more reaſon, that the difference between the invoice price and charges, and the market price at the port of delivery at the time of the loſs, was the only fair meaſure of profit for which the inſurer ought to be liable. Many caſes might be put of much greater difficulty in the calculation of profit; and this affords, perhaps, one of the ſtrongeſt grounds of objection to the inſurance of profit, at leaſt in an open policy; and if it may be inſured in a valued one, this will open a new door to the evaſion of the ſtat. 19 *G.* II. c. 37, to which valued policies have already too great a tendency.

In eſtimating a total loſs upon goods inſured by an open policy, it has been the uniform practice, to add to the prime coſt, all duties and expences, together with the premium of inſurance; and the amount of theſe has always been held to be a full indemnity. Nor is there any inſtance of profit being avowedly added, even where the loſs has happened at the port of delivery. For inſtance, if 1000l. be inſured on goods, which are loſt in the port of delivery, before they are landed; and it appear that the invoice price, together with all charges, and the premium of inſurance, amount to 800l.: But the goods, at the time of the loſs, would, had they been ſafely landed, have been worth 1000l. the ſum inſured; yet the loſs would be eſtimated at no more than 800l. So that whether the goods arrive at a riſing or a falling

(*a*) Vid *inf.* c. 4, § 1.

market,

market, the loſs to be paid by the underwriter is the ſame. The beſt reaſon that can be aſſigned for this is, the difficulty of aſcertaining the true amount of the loſs, where profit, which is ſo uncertain, is to be taken into the account. Perhaps the ſame reaſoning may be thought to apply, with equal force, to the caſe of an inſurance on profit, expreſſed in the policy.

CHAP. IV.

Of the Intereſt of the inſured in the Subject Matter of the Inſurance.

HAVING, in the two foregoing chapters, inquired what perſons may be parties to the contract of inſurance, and what may be the ſubject matter of it; we will now proceed to examine the property or *intereſt*, as it is uſually termed, which the inſured muſt have in the thing inſured, to give validity to the contract. This may be done under the following heads;

1. Inſurable Intereſt;
2. Wager-policies;
3. Re-inſurance;
4. Double Inſurance.

Sect. 1.

What ſhall amount to an Inſurable Intereſt.

INSURANCE is ſaid to be, '*a contract of indemnity* '*from loſs or damage, ariſing upon an uncertain event.*' The object of inſurance, ſtrictly ſpeaking, is, not to make a *poſitive gain*, but to avert a *poſſible loſs*. A man cannot properly be ſaid to be *indemnified* againſt a loſs which can never happen to him. There cannot be an indemnity without a loſs, nor a loſs without an intereſt. A policy, therefore, without intereſt, is not an inſurance, but only a mere wager. Of ſuch wagers we will treat at large in the

the next ſection. At preſent we will conſider what intereſt in the thing inſured, the law of *England* deems ſufficient to give validity to the contract.

Qualified property.

It would be extremely difficult to give any accurate definition of inſurable intereſt. The intereſts of commerce, and the various and complicated rights which different perſons may have in the ſame thing, require that not only thoſe who have an *abſolute* property in ſhips and goods, but thoſe, alſo, who have a *qualified* property therein, may be at liberty to inſure them; and this principal has been carried ſo far, that if a merchant abroad, in order to ſecure the payment of a debt due to his correſpondent in *England*, mortgage to him his intereſt in certain goods and freight; the correſpondent, after the mortgage becomes abſolute, may inſure the *legal* intereſt on his own account, or the *equitable* intereſt on account of the mortgagor *(a)*.

Different perſons having each a qualified property in goods, may inſure them to the full value.

Thus, where *A*, a merchant at *Peterſburgh*, writes to *B*. his correſpondent in *London*, to whom he is indebted, informing him that he has ſhipped a quantity of goods for *London*, conſigned to him, and will ſend him the bill of lading, and deſiring him to inſure them. This *B*. immediately does, and *A*. having ſhipped the goods, inſtead of ſending the bill of lading to *B*., indorſes it, for a valuable conſideration, to *C*. at *Peterſburgh*, who tranſmits it to *D*. his correſpondent in *London*, with directions to inſure, which *he* alſo does; but appriſes the underwriters of the former inſurances made on the ſame goods by *B*.—In this caſe it was determined, upon great conſideration, that each had an inſurable intereſt.

Godin v. *Lond. Aſſur.* 1 *Bur.* 489, 1 *Bl.* 103, inf. § 4.

The following caſe will further illuſtrate the ſame principle.

An inſurance was made on goods, "At and from *Jamaica* to *London*;" and it was ſtated at the head of the policy, to be, "*on account of Robert Kerr*, Eſq."—The plaintiffs were merchants in *London*, and the general

The indorſement of a bill of lading to a creditor, is payment *pro tanto*, and conveys, *prima facie*, the whole property in the goods from the time of delivery. But if it be only to hind the net proceeds, the indorſer has

(*a*) Per *Aſhurſt*, J. in *Smith* v. *Laſcelles*, 2 T. R. 188.

 conſignees

ſtill an inſurable intereſt.

Hibbert and others v. *Carter*, 1 T. R. 745.

conſignees of *Kerr*, a planter in *Jamaica*; and were in the conſtant habit of getting his goods inſured. On the 23d of *December* 1782, they received advice from him by letter, dated the 18th of *October*, of his having ſhipped 10 hogſheads of ſugar on board the *Devonſhire*, with general directions to inſure whatever goods were ſhipped by him. —The inſurance in queſtion was immediately effected; but between the time when the order was ſent, and the effecting of the policy, *Kerr* indorſed the bill of lading to one *Dellprat*, to whom he was indebted, and informed the plaintiffs of this by letter. The bills of lading, as they originally ſtood, expreſſed the ſugars to be ſhipped on the account and riſk of "*the ſhipper*," with directions to deliver to his order, or that of his aſſigns. The indorſement was in theſe terms:—"Deliver the above "ſugars to Mr. *J. Hodgſon*, for account of *S. Delprat*, "*Robert. Kerr.*"—The ſhip was loſt.—An action being brought on the policy, the plaintiffs, at the trial, reſted their caſe on the above facts.—The defendant objected that *Kerr*, having aſſigned the bill of lading before the inſurance was actually effected, the averment in the declaration that theſe ſugars had been inſured *on his account*, was not true; for he had not then any inſurable intereſt in him, the entire property having paſſed out of him by the aſſignment of the bill of lading, which operated in this inſtance as a payment.—Mr. Juſtice *Buller*, who tried the cauſe, being of this opinion, would have nonſuited the plaintiffs: But the defendant having neglected to pay the premium into court, they took a verdict for that ſum.—They moved, however, for a new trial, inſiſting that the verdict ought to have been for the *whole* ſum inſured.—But the court determined that the plaintiffs were not entitled to recover for any *leſs* in this caſe, being all clearly of opinion, that where a bill of lading is taken by a creditor as a ſecurity for his debt, on his own account, the whole property paſſes by the delivery, and is to be conſidered as a ſatisfaction of the debt, *pro tanto*: But, that the parties are always at liberty to vary from the general rule, by entering into any particular agreement between themſelves; which, however,

muſt be ſhewn, in order to take advantage of it.—Afterwards the motion was renewed, by leave of the Court, on an affidavit ſtating the particular tranſaction between the parties; viz. That *Kerr* had no intention to paſs the whole *property*, by the indorſement of the bill of lading; but only to bind the *conſignment*; for which purpoſe he had ordered the plaintiffs to pay the net proceeds to *Dellprat*; and that ſince that time, *Kerr*'s executors had accounted to *Dellprat* for the amount of the ſugars that had been loſt, a demand having been made on them for that purpoſe. Upon theſe new facts, a new trial was granted without oppoſition *(a)*.

A reaſonable expectation of *profit*, or a well-founded expectation of a future intereſt in the thing inſured, is an inſurable intereſt.

In the caſe of *Grant* v. *Parkinſon*, which we have already had occaſion to mention, and which we ſhall have occaſion to mention more particularly hereafter *(b)*, it was determined that a reaſonable expectation of profit, though it be not a veſted property, is an inſurable intereſt. Upon the authority of that caſe, it has ſince been determined, that the poſſeſſion of the things inſured, and a reaſonable expectation of a future intereſt therein, though depending on the pleaſure of the crown, is an inſurable intereſt *(c)*. Of this nature is the intereſt which the captor acquires in a prize regularly taken in war. From the moment that the victor hoiſts his flag on board a conquered ſhip, he has acquired a qualified property in her which he may inſure *(d)*. For though the King is, in contemplation of law, the captor, and the property of every prize immediately veſts in him; yet the

(a) Vid. *Caldwell* v. *Ball*, 1. *T. R.* 205.—*(b)* Vid. ſup. 78. *inf.* § 2.—*(c)* But a mere hope or expectation of future gain, however well-founded, is not an inſurable intereſt, unleſs accompanied by poſſeſſion of the ſubject matter of the inſurance.—Vid. *Tonge* v. *Watts*, *inf.* c. 6. § 5.—*(d)* Item quæ ex hoſtibus capiuntur, jure gentium ſtatim capientium fiunt. Dig. l. 41, tit. 1, § 5. n. 7. de acquir. rer. dom.—Un priſe que fait en tems de guerre un vaiſſeau corſaire, autoriſé pour aller en courſe, eſt un profit acquis auſſitot qu'elle eſt fait: C'eſt pour quoi le propriétaire du vaiſſeau corſaire peut le faire aſſurer pour tous les dangers qu'elle court, juſqu' á ce qu'elle ſoit ameneé dans un port de *France*. *Pothier*, h. t. n. 38.

practice of beſtowing all prizes taken from the enemy, upon the officers and men, who are the perſons immediately concerned in the capture, is ſo conſtant and uniform, that the law will conſider the expectation, founded upon this practice, as equivalent to a veſted intereſt. This doctrine will be found exemplified in the following caſe.

The captors, upon a joint capture by ſea and land forces, have an inſurable intereſt in the prize, before condemnation.

Le Craw. Hughes, B. R. E. 22. G. 3, MS.

An inſurance was made on the ſhip *Saint Domingo* and her cargo, "At and from *Omoa* to *London*;"—In an action on the policy it appeared, that Captain *John Luttrell*, with a ſquadron of men of war, and Captain *Dalrymple*, with a party of land forces on board, captured two *Spaniſh* regiſter ſhips, lying under the protection of *Fort Omoa*, together with the fort itſelf, which were a joint capture to the ſea and land forces: That the *Saint Domingo*, one of the regiſter ſhips, on her voyage to *London*, laden with the property captured, was, together with a great part of her cargo, loſt by the perils of the ſea: That the intereſt, intended to be covered by the policy, was that of the *officers and crews of the ſquadron*. The goods were valued at the ſum inſured. There were other policies on the ſame ſhip and goods amounting in all to 99,500l.—The principal queſtion was, whether, by the *Spaniſh* prize act (*a*), the captors had an *inſurable intereſt* in theſe prizes.—On the part of the underwriters, it was objected that, as this was a joint capture by the ſea and land forces, the ſoldiers had not only no ſhare, but prevented the navy from having any; for, the act not having provided for ſuch a capture, the whole reſted in the crown.—But the court determined that the plaintiff had an inſurable intereſt.—Lord *Mansfield*, in delivering the opinion of the court, ſaid—"There are two queſtions in this cauſe; *firſt*, Whether the ſea officers had an inſurable intereſt, and this will depend on the prize act and proclamation; and, *ſecondly*, Whether poſſeſſion, and the expectation of future benefit, founded on the contin-

(*a*) Stat. 19 G. III. c. 67.

gency

gency of a future grant from the crown, but warranted by almoſt univerſal practice, would amount to an inſurable intereſt. As to the firſt, the act gives to the officers, ſeamen, marines and ſoldiers on board every ſhip of war, the ſole property in all ſhips and goods which they ſhall take during the war, after condemnation. So that the act does not ſay that the ſeamen only ſhall take, nor does it leave a joint capture by the army and navy altogether undefined. It is like the caſe of a capture by a combined fleet. I remember ſuch a caſe; but the *Engliſh* ſailors could not claim the whole, nor could the act mean that they ſhould have nothing. The ſame obſervation might be made on a joint capture by the King's ſhips and privateers. For ſuch caſes there is no proviſion in the act, and yet, no doubt, the navy is intitled. Where ſoldiers aſſiſt, their right may be doubtful, but that does not leſſen the right of the navy.—As to the ſecond ground, the crown always makes the grant, and there is no inſtance to the contrary. —Probable profit may be inſured, and the caſe of *Grant* v. *Parkinſon* (*a*), where an intereſt, *not veſted*, was holden to be inſurable, is an authority in point. On either ground, therefore, the Plaintiff has an inſurable intereſt (*b*)."

The caſe of *Grant* v. *Parkinſon*, went much farther than this. In that caſe there was neither a veſted intereſt nor poſſeſſion of that in which the intereſt was claimed, but only a bare expectation of profit: Here, there was a veſted intereſt, a poſſeſſion, and a reſponſibility to the owner, if it ſhould turn out that the capture was illegal.

Truſtees having the diſpoſal of ſhips and goods according to the directions they may receive from third perſons, may inſure.

The following caſe, which has been recently determined, ſhews that perſons in the character of *truſtees*, for the diſpoſal of ſhips and goods according to ſuch inſtructions as they might receive from third perſons, may inſure ſuch ſhips and goods for the benefit of the perſons who may eventually be entitled to the produce of them.

Commiſſioners being authorized by ſtatute to take into their care all *Dutch* ſhips, &c. detained in *Britiſh* ports, and to diſpoſe thereof according to di-

The ſtat. 35 G. III. c. 80, § 21, after reciting that ſeveral ſhips and veſſels belonging to the ſubjects of

(*a*) *Inf.* § 2.—(*b*) See *Boehm* v. *Bell*, inf. ch. 15, § 1. where the ſame point was admitted as clear law.

rections from the privy council, may inſure, in their own names, ſuch ſhips, after ſeizure at ſea, and while they are on their paſſage to *England*. —A count ſtating the nature of their truſt, and averring an intereſt in them *as commiſſioners*; or even without any averment of intereſt in any perſon, but with an averment that the ſhips inſured did not belong to his Majeſty or any of his ſubjects, is good.

Crawford and others v. *Hunter*, 8 T.R. 13.

the *United Provinces*, and others having on board goods and effects belonging to ſuch ſubjects, had been, or might be, thereafter *detained in, or brought into the ports of this kingdom*, and ſuch ſhips and cargoes might periſh and be greatly injured if ſome proviſion were not made reſpecting the ſame, gives to his Majeſty the power of granting 'a commiſſion to three or more perſons, authorizing them 'to take ſuch ſhips and cargoes into their poſſeſſion and 'under their care, and to manage, ſell, or diſpoſe of the 'ſame to the beſt advantage, according to ſuch inſtructions as they ſhould from time to time receive from his 'Majeſty, with the advice of his privy council.'—Commiſſioners being appointed under this Act, and certain *Dutch* ſhips with their cargoes being ſeized at ſea by one of his Majeſty's ſhips, and carried into *St. Helena*, in order to be brought from thence to *England*, the plaintiffs, by the name of "The honourable commiſſioners for the ſale of *Dutch* property," as well in their own names as in the names of all other perſons to whom the ſame might appertain, made an inſurance on theſe ſhips and goods, loſt or not loſt, at and from *St. Helena* to *London*.—A loſs having happened in the courſe of the voyage, the plaintiffs brought their action on the policy, and in their declaration, after ſtating the above facts, averred that they, *as ſuch commiſſioners*, at the time of the ſailing of the ſaid ſhips from *St. Helena*, and from thence until the time of the ſeveral loſſes, *were intereſted* in the ſaid ſhips and goods to the amount of the ſums inſured, and that the ſaid inſurance was made for their uſe, benefit, and account, *as ſuch commiſſioners*. It then ſtated the ſailing of the ſhips from *St. Helena*, and their ſubſequent loſs by the perils of the ſea, and that the plaintiffs as ſuch commiſſioners ſuſtained an average loſs of 40*l. per cent.*—The ſecond and third counts were ſimilar to this, but the one averred the intereſt to be in *his Majeſty*, the other in the *Dutch Eaſt India Company*. The fourth count was alſo ſimilar, except that it did not aver intereſt in any perſon; but merely ſtated that the policy was made by the plaintiffs as ſuch commiſſioners, 'as well in their own names, as

'for

'for and in the name or names of all and every other 'perſon or perſons to whom the ſame did or might apper- 'tain in part or in all.' It alſo contained this averment, that '*the ſaid ſhips or any of them were not belonging to his* '*Majeſty or any of his ſubjects*, before or at the time of 'making the policy, or at the ſeveral times of the loſſes 'happening; and that the plaintiffs were the perſons who 'gave the orders and directions to the agent immediately 'employed to effect the policy.'—Upon a ſpecial demurrer to the firſt and fourth counts, it was objected, as to the firſt, (averring the intereſt to be in the plaintiffs as commiſſioners), that they had, at the beginning of the adventure, and at the time when the inſurance was effected, only an intereſt *in expectation* in the ſhips and goods, and that no caſe had ever gone ſo far as to determine that to be an inſurable intereſt: That their authority to manage, ſell, and diſpoſe of the property, (from which alone an intereſt could ariſe to them), was not to commence till the arrival of the property in a *Britiſh* port, which event never took place, and conſequently their intereſt never attached. And as to the fourth count, it was objected that it was *repugnant in ſubſtance*, in as much as it averred that '*none of the ſhips inſured belonged to his Majeſty or any* '*of his ſubjects*', (which averment was made to take the caſe out of the ſtat. 19 *G.* II. c. 37, prohibiting wagering inſurances on ſhips or goods belonging to his Majeſty or any of his ſubjects); whereas theſe ſhips, being ſeized under his Majeſty's orders, belonged to him: But at all events, it ought to have been ſpecifically averred in this count that there was an intereſt in ſome perſon, eſpecially ſince the above act: And though the general allegation that the inſurance was effected by the plaintiffs, for and in the names of all perſons who might be intereſted, was large enough to comprehend all perſons who were in fact intereſted, yet it could not be maintained that an inſurance intended for the benefit of one individual, could be thus tranſferred to another.—The court, after two arguments, were clearly of opinion that the plaintiffs were entitled to judgement on the firſt count, and that the ſecond

cond count was alſo good.—Lord *Kenyon* ſaid:—"The ſhips having been ſeized at ſea by his Majeſty's ſhips of war were at *St. Helena*, and were to be brought to this country, to be put under the care, management, and diſpoſal of the plaintiffs, as commiſſioners under the act. Being ſo ſeized, they could not come here under any other management, or to any other perſons than the plaintiffs, *as truſtees*. Then can a *truſtee* inſure? There is no doubt but he may. It was ſaid, however, in the courſe of the argument, that there cannot be a truſtee for the Crown: But that argument was ſoon abandoned, as untenable; and certainly it cannot be ſupported. Then can a *conſignee* inſure? Surely he may. Can an *agent for prizes* inſure? Certainly; and theſe plaintiffs are like agents for prizes. With one part of the caſe of *Le Cras* v. *Hughes* (*a*) I fully concur, and on that no doubt can be entertained, namely, that an agent for prizes, though he has not the poſſeſſion, has ſuch an intereſt in the ſhips coming home, that he may inſure; and in ſo deciding, Lord *Mansfield* only proceeded on principles previouſly ſettled and eſtabliſhed. Therefore, as well on the authority of that caſe, as on certain poſitions which muſt be admitted on all hands, I am of opinion that the plaintiffs are entitled to our judgement on the firſt count. The ſecond queſtion, whether or not the plaintiffs may declare in the manner in which the *fourth* count is framed, depends, I think, on the conſtruction of the ſtat. 19 *Geo.* II. c. 37. Notwithſtanding what has been ſaid in the argument on behalf of the defendant, I think that, at common law, a perſon might have inſured without having any intereſt. And this is in ſome meaſure proved by the caſe of *Goddart* v. *Garret* (*b*). Since that, an application was made to the Court of Chancery to have the policy delivered up: For that Court ſometimes relieves, as was ſaid by Sir *J. Jeykell* in *Cowper* v. *Cowper* (*c*), againſt the rigour of the law, when certain circumſtances are diſcloſed, to induce that Court to interfere. But the preamble and enacting part of the ſtat. 19 *G.* II. c. 37,

A Truſtee, a conſignee, or an agent for prizes, may inſure.

At common law, an inſurance might have been made without intereſt.

(*a*) Sup. 84.—(*b*) 2 *Vern.* 269, inf. § 2.—(*c*) 2 *P. W.* 753.

remove

remove all doubt on this point. It recites the miſchief and inconveniences that had ariſen from the making of inſurances, intereſt or no intereſt, and then it *enacts*, (not declaring), that no ſuch inſurance ſhall be made, except in certain caſes, which, for very wiſe and politic reaſons, were excepted. Therefore I am ſatisfied that this count is good, unleſs it be on an inſurance prohibited by the ſtatute. But that ſtatute only applies to "ſhips belonging to his Majeſty or any of his ſubjects," and does not extend to foreign ſhips. The defendant's counſel then wiſhed to conſider theſe ſhips as belonging to the Government of this country: But that cannot be ſo conſidered, for the property in captured ſhips is not altered before condemnation in the Court of Admiralty."—Mr. Juſtice *Aſhurſt* ſaid,—"The principal queſtion in this caſe is, whether the fourth count can be ſupported for want of an averment of intereſt in the plaintiffs in the ſubject-matter inſured; as to which, I am of opinion, that the declaration is good, without ſuch an averment. For this is not a caſe that falls within the purview of the ſtatute againſt gaming policies. But without entering into that, upon the firſt count, it is ſufficiently clear, that the plaintiffs were intereſted. It is not neceſſary that there ſhould be any technical form of words made uſe of by way of averment of intereſt; it is ſufficient if the fact appear to be ſo. Suppoſe the ſubject of the inſurance had been an enemy's ſhip, taken as prize, in time of war, by a King's ſhip, and the captain of ſuch ſhip had inſured her, I ſhould conceive ſuch inſurance would be good. The information given to the underwriters by the plaintiffs, on the face of the preſent declaration, is matter of equal notoriety; for it ſhews the act of Parliament by which a power and authority were veſted in the Crown for the ſeveral purpoſes therein mentioned, and that the plaintiffs were appointed commiſſaries by the King, to take care of ſuch property, of a certain deſcription, as might come into their hands, and that this was property of that deſcription. This ſeems to be all that the underwriters could have occaſion to know, and ſhews that the plaintiffs were in the nature of

The captain who makes a capture may inſure his prize.

of agents. The plaintiffs did not affect to make this inſurance in their own right, but as truſtees for thoſe perſons who ſhould eventually be entitled to it."—Mr. Juſtice *Groſe* ſaid,—"The firſt queſtion in this caſe is, whether or not the plaintiffs had an inſurable intereſt in the ſhips and goods inſured. Now they were either truſtees, conſignees, or agents, for thoſe who might eventually be entitled to the produce. If they were truſtees or conſignees, it ſeems admitted that they might have inſured. And if they be conſidered as agents, then they had an inſurable intereſt, according to the deciſion in the *Omoa* caſe. As to the other queſtion, whoever reads the ſtatute 19 *Geo.* II. muſt ſee what the law was before the paſſing of that act. Before that time, a wagering policy was not illegal. The words of that ſtatute clearly ſhew that before that time perſons might have inſured without intereſt; therefore it is not neceſſary to aver intereſt in any caſe not prohibited by that act. And this caſe does not come within the prohibition of that act, becauſe it was an inſurance on foreign ſhips."

It is not neceſſary to aver intereſt in any caſe not prohibited by the 19 *G.* II. c. 37.

The following caſe will ſhew that a mere *ceſtui que truſt* of goods, without any legal title, may inſure.

A. being indebted to *B.*, without any order from *B.*, conſigns goods to *C.* to be held for *B.* and indorſes the bill of lading to *C.*—*B.* has a good inſurable intereſt in the goods ſo conſigned to *C.*

Hill & al. v. *Secretan*, 1 *Pul.* & *Baſ.* 315.

An inſurance was made on behalf of the plaintiffs, on goods on board the *San Bernardo*, "at and from *Andero* to *London*." —In an action on this policy to recover a loſs by capture, it appeared that *De la Torré*, in *Spain*, had conſigned 29 bags of wool to *Dubois* in *London*, and indorſed the bill of lading to him; but that, with the bill of lading, came a letter, directing *Dubois* to hold 15 bags for a houſe at *Halifax*, and the remainder for the plaintiffs at *Exeter*, which were the goods inſured. It alſo appeared that *De la Torré* was indebted to the plaintiffs to the amount of 500 L, but that they had given no orders for theſe goods: The only queſtion was, whether the plaintiffs had an inſurable intereſt.—They obtained a verdict; and, on a motion for a new trial, it was contended on the part of the defendant, that as the bill of lading was not indorſed to the plaintiffs, and as *De la Torré* would ſtill be liable for his debt to them, if the goods ſhould not reach them, they

they remained the property of *De la Torré*, and the plaintiffs had no right in them.—But the court were clearly of opinion, that, as the goods were conſigned to *Dubois*, to hold for the plaintiffs, he was to be conſidered as truſtee for them; and that the plaintiffs, being creditors of *De la Torré*, raiſed a good conſideration for the conſignment, and the plaintiffs had a good inſurable intereſt.

A general agent to whom a conſignment devolves, in conſequence of the conſignees refuſal to take the goods, may inſure them as agent for the conſignor, or in his own right, if he has accepted bills on account of them.

If the conſignor of a cargo of goods ſend the bills of lading, together with the bills of exchange for the amount of the cargo, to his general agent, with directions to deliver the bills of lading to the conſignee, on his accepting the bills of exchange, and the conſignee refuſe to receive the goods or accept the bills of exchange: Such general agent becomes in effect the conſignor of the goods, and may inſure them as agent for the conſignor, or in his own right, if he has accepted bills on the credit of the goods (*a*).

But an inſurable intereſt can only be founded on a legal or equitable title; and a mere claim which the law cannot admit to be either legal or equitable, is not an inſurable intereſt.

From the authorities which have been already cited, it appears that, provided the object of the contract be not a wager, almoſt any qualified property in the thing inſured, or any reaſonable expectation of profit or advantage to ariſe therefrom, will conſtitute that ſort of intereſt which the party may legally protect by inſurance.—Still, however, an inſurable intereſt muſt be founded on ſome legal or equitable title; and the following caſe will ſhew, that though a perſon may have a ſort of *claim*, which, as between him and the legal owner, might be thought reaſonable, and ſuch as the legal owner could not conſcientiouſly diſpute; yet if this claim be inconſiſtent with the only title which the law can recognize, it will not be deemed to be even an equitable title, and therefore not an inſurable intereſt.

Four Perſons purchaſe a ſhip, which is only regiſtered in the names of *two* of them; the *four* have not any inſurable intereſt in the freight, having neither a legal nor an

In an action on a policy on freight valued at 5000*l.* there were two counts in the declaration. The firſt averred the intereſt to be in the three plaintiffs, *Camden*, *Calvert* and *King*, in whoſe names the inſurance was made; the ſecond averred it to be in the plaintiffs and one *Cur-*

(*a*) R. *Wolff* v. *Horncaſtle*, 1 *Pul. & Baſ.* 316. poſt. c. 7. § 3.

equitable title to the ſhip.

Camden & al. v. *Anderſon*, 5 T. R. 709.

ſtir.—On the trial, it appeared that the ſhip, of which the freight was inſured, had been paid for by the four perſons named in the laſt count, to whom a bill of ſale was made.—The defendant produced a regiſter made in 1786, in purſuance of the ſtat. 26 G. III. c. 60, (*Lord Hawkeſbury's* act), wherein the ſhip was regiſtered in the names of *Camden* and *Calvert* only, and it was inſiſted, that, as the plaintiffs title to freight could only ariſe from the ownerſhip, the regiſter was deciſive evidence that no other perſon than thoſe two were intereſted in the property (*a*); and there was no count in the declaration ſtating the intereſt to be in thoſe two.—The plaintiff, however, took a verdict, with liberty to the defendant to move to enter a nonſuit.—Upon this motion, it was contended on the part of the plaintiffs; *firſt*, that it was competent to *Camden* and *King*, in whoſe names the ſhip was regiſtered and the bill of ſale taken, to tranſfer their right by parol agreement to the other two partners jointly with themſelves; *ſecondly*, that it was ſufficient for them to ſhew that they had an equitable intereſt to entitle them to freight; that upon the ſtat. 19 G. II. c. 37, requiring that the inſured ſhould have an intereſt in the ſubject matter of the inſurance, there was no doubt; for whether it was a legal or an equitable intereſt, or even a reaſonable expectation of an intereſt, it was ſtill inſurable.—But the court clearly held that the *four* partners had not any inſurable intereſt in the freight, and a nonſuit was accordingly entered.—Lord *Kenyon* ſaid,—"I ſtudiouſly avoid diſcuſſing the queſtion whether or not a party may inſure a *hope or expectation*, not having any intereſt in the ſubject inſured: It will be time enough to examine that caſe when it ariſes. But on the preſent queſtion I cannot

Whether a hope or expectation be inſurable is not decided.

(*a*) By ſtat. 26 G. III. c. 60. § 17, 'When and ſo often 'as the property in any ſhip or veſſel, ſhall be transferred to any 'other or others, in whole or in part, the certificate of the re-'giſtry of ſuch ſhip or veſſel ſhall be truly and accurately recited, 'in words at length, in the bill or other inſtrument of ſale 'thereof, otherwiſe ſuch bill of ſale ſhall be utterly null and void 'to all intents and purpoſes."

entertain

entertain a doubt; for the right to freight reſults from the right of ownerſhip; and if the plaintiffs have no title to the ſhip, they have no intereſt in the freight. It is like the caſe of an action for uſe and occupation: If one perſon permit another to enjoy his eſtate, it is not competent to the latter to diſpute the title of the former. But if the former bring an action againſt a third perſon, which depends on his own title, he cannot ſucceed, unleſs he ſhew a title. So, if the plaintiffs had let out the ſhip to other perſons, perhaps thoſe perſons would not have been ſuffered to conteſt the plaintiffs title: But here, the plaintiffs claim the freight in right of ownerſhip: They had no right to inſure the freight, unleſs they can ſhew a right to the ſhip: It is not pretended that they had any legal title to the ſhip; and according to the deciſion of *Hibbert* v. *Rolleſton* (*a*), they had no equitable title. It was there held, that the regiſter act was equally binding in a court of equity, as in a court of law, and the court refuſed to compel the vendor to make a legal conveyance to the purchaſer, who claimed under a defective bill of ſale. And, indeed, if an equitable intereſt could prevail in contradiſtinction to a legal intereſt, it would repeal the wiſe proviſions of that act, which has proved highly beneficial to the commercial intereſts of this country."

Freight can only be due to the legal owner of the ſhip, and he only can inſure it.

And no perſon can have either a legal or equitable title to a ſhip, unleſs he be named in the regiſter.

Though *reſpondentia* and bottomry loans are of themſelves a ſpecies of inſurance, yet the lender has an inſurable intereſt in his ſecurities, and therefore may protect himſelf from the *ſea-riſk* by inſuring them. If I lend *J. S.* 1000*l.* on bottomry at 12 *per cent.* for a given voyage, and the ſhip arrive ſafe, he muſt pay me the ſum lent with the ſtipulated intereſt. If ſhe be loſt *J. S.* is diſcharged from the debt. My capital is therefore put in riſk; and there can be no reaſon why I ſhall not inſure it. And this inſurance is in nature of a re-inſurance.

The lender upon bottomry and *reſpondentia* has an inſurable intereſt for the ſums lent.

In ſeveral parts of *Italy* it is permitted to lend money on bottomry and *reſpondentia*, where the borrower has no-

(*a*) 3 T. R. 406.

thing

thing on board. It is ſingular, however, that in ſuch caſe, if the lender inſure his capital, and the ſhip be loſt, the inſurer is not anſwerable, unleſs the inſurance was made in the *form* of a wager. At *Genoa*, even in that form, ſuch inſurance is prohibited (*a*).—In *Italy* the lender may inſure, not only his principal, but alſo the maritime intereſt. But upon the intereſt, the inſurance is conſidered as a wager. Even the honeſty of the borrower may be inſured (*b*).—In *France* the borrower is prohibited from inſuring the ſum borrowed; and the lender, though he may inſure his capital, muſt not inſure the intereſt (*c*).

The owner of the ſhip or goods has only an inſurable intereſt in the ſurplus value above the ſum lent.

The lender can inſure only the amount of the ſum lent, and the borrower has an inſurable intereſt in the ſhip or goods to the amount of the ſurplus value above the ſum lent (*d*). If either were to inſure more, it would be a gaming inſurance, and void by the ſtat. 19 *G.* II. c. 37, for all above the real intereſt.

Yet where the uſage of a particular trade has ſanctioned a departure from this rule, an inſurance made in conformity to ſuch uſage will be good.—As where an inſurance was made on behalf of the captain of an *Eaſt-Indiaman*, on "*goods, ſpecie, and effects*" on board his ſhip.—In an action on the policy, the plaintiff claimed to recover, under that inſurance, money which he had expended in the courſe of the voyage for the uſe of the ſhip, and for which he charged *reſpondentia* intereſt.—On the trial of the cauſe, it was proved by the teſtimony of many captains in the *Eaſt India* trade, that this kind of intereſt was always inſured under the denomination of goods, ſpecie, and effects.—The court determined, that under this uſage the plaintiff might recover.—Lord *Mansfield*, after delivering his opinion upon another point which aroſe in the caſe, ſaid;—"As to the queſtion, whe-

But the uſage of trade may take a caſe out of this rule. Upon an inſurance on goods, ſpecie and effects in the *India* trade, the inſured may recover for money laid out for the uſe of the ſhip, and for which he charged reſpondentia intereſt; it being the uſage of the trade to inſure in this form.

Gregory v. *Chriſtie*, *B. R.* Tr. 24. *G.* III. *Park* 11, inf.

(*a*) *Caſaregis*, diſc. 14. n. 21.—(*b*) *Caſaregis*, diſc. 1. n. 123, 124.—(*c*) Ord. of *Louis* 14, h. t. art. 16, 17. *Pothier*, h. t. 32, 44. *Emerig.* tom. 1. p. 236, 237.—(*d*) Vid. 19 *G.* II. c. 37, § 5, and Lord *Mansfield's* expoſition of it in *Glover* v. *Black*, 3 *Bur.* 1394, 1 *Bl.* 399, 405, 422.—

"ther

"ther goods, ſpecie, and effects," comprehend this intereſt, I ſhould think not; if we were to conſider only the *words* made uſe of. But here there is an *expreſs uſage* which muſt govern our deciſion. A great many captains in the *Eaſt India* ſervice ſwear that this kind of intereſt is always inſured in this way; and I obſerve that the perſon here inſured is the captain.

The borrower cannot underwrite a policy on bottomry.

It is plain that a policy on bottomry or *reſpondentia* cannot be ſubſcribed by the borrower of the money; becauſe it is only in conſideration of the ſea riſk, from which he is exempt, that he agrees to pay the marine intereſt. If he were to become an inſurer, this would be no longer a loan upon bottomry, but a cloak for uſury.

Sect. 2.

Of Wager Policies.

Gaming.

MANY are the contrivances which men have fallen upon for the gratification of their propenſity to gaming: And the uncertain events of maritime adventure afford an obvious and extenſive field for the calculation of chances, and the deciſion of fortune.

The practice of gaming, by nouriſhing a conſtant hope of gain, excites in the mind an intereſt which engroſſes the attention, and withdraws the exertions of men from uſeful purſuits. By pointing out a ſpeedy, though hazardous mode of accumulating wealth, it produces a contempt for the moderate, but certain, profits of ſober induſtry. It perverts the activity of the mind, taints the heart, and depraves the affections. By frequent and great reverſes of fortune, it becomes not only the ſource of great private miſery, but ſuggeſts conſtant temptations to fraud and the perpetration of atrocious crimes.

Legality of wagers in *England*.

There are few well regulated governments in which gaming has not been laid under conſiderable reſtrictions. In this country ideas leſs rigid have prevailed. Innocent

wagers

wagers have long had the ſanction of the common law (*a*). They are only deemed illegal where they are prohibited by ſtatute (*b*); where they tend to create an improper influence on the mind in the exerciſe of a public duty (*c*); where they are *contra bonos mores*, or in any other manner tend to the prejudice of the public, or the injury of third perſons (*d*). And after all it muſt be owned, that the law greatly deſcends from its dignity, when it lends its aid to give effect to any wager, however innocent.

We

(*a*) 11 *Rep.* 876, 1 *Lev.* 33, 5 *Bur.* 2802.—(*b*) *R. Ximenes* 6 T. R. 499.—(*c*) *R. Allen* v. *Hearn*, 1 T. R. 56.—(*d*) *R. Atherfold* v. *Beard*, 2 T. R. 610, *R. Da Coſta* v. *Jones*, *Cowp.* 729. And yet in the caſe of *Jones* v. *Randall*, *Cowp.* 37, the Court determined that an action might be maintained on a wager, 'whether a decree of the court of Chancery 'would be reverſed or not in the Houſe of Lords.'—It is not eaſy to reconcile with any juſt idea of public policy, that a wager upon the event of a deciſion in the ſupreme court of juſtice, ſhould have met with ſo much countenance. In the caſe of *Atherfold* v. *Beard*, above referred to, Mr. Juſtice *Aſhurſt* ſays that, 'in 'his opinion, the courts had gone far enough in encouraging 'wagers, and that it would, perhaps, have been better for 'the public if the courts had originally determined that no ac-'tion could be maintained to enforce the payment of a wager.' Mr. Juſtice *Buller*, in the ſame caſe, ſeemed to doubt the legality of any wager between perſons not intereſted in the ſubject matter; and ſaid that the ſtat. 14 *G.* III. *c.* 48, extended to all wagers, though it ſpeaks only of *policies*; 'for,' ſays he, 'ei-'ther the courts muſt reſtrain that act to ſuch caſes as *in form* 'are policies, which would entirely repeal it; or, by purſuing 'the ſpirit of it, extend it to all caſes. I think the latter is 'the true conſtruction; for a policy is nothing but a promiſe. 'And it would be ſtrange to determine that the party might do 'the ſame thing in one form, which the ſtatute has expreſsly 'prohibited to be done in another.'—In the caſe of *Good* v. *Elliott*, 3 T. R. 693, Mr. Juſtice *Buller* had an opportunity of maintaining the opinion which he had thus thrown out.—The queſtion was, *firſt*, whether a wager that *A.* had purchaſed a waggon of *B.* was void at common law, as being a *gaming contract*; and *ſecondly*, whether it was void by the above ſtat. 14 *G.* III. The learned judge maintained the affirmative on both points. But the reſt of the judges of the court of King's Bench, namely,

We have already obſerved (*a*), that an inſurance, being a contract of *indemnity*, its object is, not to make a *poſitive gain*, but to avert a *poſſible loſs*; and that, as a man can never be ſaid to be *indemnified* againſt a loſs which can never happen to him, a policy without intereſt is no inſurance, but only a mere wager. It is *ſpei emptio*, and and not *averſio periculi*, which is the true idea of an inſurance. A policy, therefore, made without intereſt, is properly denominated a wager policy, and has nothing in common with inſurance but the name and form. Difference between a wager and an inſurance.

It is uſually conceived in the terms, '*intereſt or no intereſt*,' or, '*without further proof of intereſt than the policy*;' to preclude all enquiry into the intereſt of the inſured. And, as a conſequence of the inſured's having no intereſt in the pretended ſubject of the policy, it follows that the inſurer cannot be liable for any partial loſs. A partial loſs is not an event ſufficiently defined and accurate to be the criterion of a wager; and nothing but that ſort of misfortune which is conſidered as amounting to a total loſs can decide it. The parties mean to play for the whole ſtake; and when the underwriter pays a loſs, he cannot, as in the caſe of an inſurance upon intereſt, claim any benefit from what may have been ſaved. To preclude all claim of that ſort the words, '*free of average, and without benefit of ſalvage*,' are always introduced into wager policies. Form of a wager policy.

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namely, Lord *Kenyon*, Mr. Juſtice *Aſhurſt*, and Mr. Juſtice *Groſe*, were clearly of a contrary opinion upon both points. They held that, however it might be wiſhed that no wagers were permitted, yet that the queſtion, whether an action would lie on *any* wager, had been ſettled by ſo many authorities, both ancient and modern, that no doubt could be entertained upon it. And as to the ſecond point, whether the wager was void by the ſtat. 14 *G.* III., they held that that act related wholly to *policies of inſurance*, and that it would be diſtorting the meaning of the words, to ſuppoſe that ſuch a wager as the above could have been within the meaning of the legiſlature.

(*a*) *Sup.* 80.

Wager policies prohibited in moſt of the commercial ſtates.

Theſe gaming contracts were formerly in uſe in *France*, and they are ſtill tolerated in *Portugal* and ſome parts of *Italy*. In *France* the miſchief of them was ſoon diſcovered, and they were prohibited in the year 1681 by the ordinance of the marine (*a*), which ſeems to have been, in this reſpect, ſcrupulouſly enforced. And ſo general, indeed, is the averſion from all inſurances not founded upon a real and veſted intereſt in the thing inſured, that not only wagers, in the form of inſurances, but even inſurances upon expected profit, freight not earned, ſeamen's wages, &c. are prohibited by the ordinances of moſt of the commercial ſtates of *Europe* (*b*).

Whether legal in *England*.

If the queſtion, whether a wager policy be a legal contract at common law, were now *res integra*, I think it would be extremely difficult to maintain the affirmative. As a *wager*, I need only refer the reader to the preamble to the ſtat. 19 *G.* II. c. 37 (*c*), to ſhew that it is pregnant with as much miſchief, both public and private, as can proceed from any ſpecies of gaming which the legiſlature has hitherto found it neceſſary to repreſs. And yet, within the ſpace of little more than a century, it has crept into uſe in this country, and has at length obtained the ſanction of the courts of *Weſtminſter*. It will not be unintereſting to trace, as far as we are enabled by authorities, the ſteps by which this miſchievous ſpecies of gaming came to find ſo much favour in the eyes of the law.

(*a*) Defendons de faire aſſurer ou réaſſurer des effets au dela de leur valeur, par une ou pluſieurs polices, à peine de nullité de l'aſſurance, et de confiſcation des marchandiſes. —Si toutefois il ſe trouve une police faite ſans fraude, qui excéde la valeur des effets chargés, elle ſubſiſtera juſqu'à concurrence de leur eſtimation; et en cas de pérte, les aſſureurs ſeront tenus chacun à proportion des ſommes par eux aſſurées comme auſſi de rendre la prime du ſurplus à la reſerve du demi pour cent. Ord. de la Mar, h. t. art. 22, 23. Vid. *Valin* ſur ces articles, p. 71, 72.—(*b*) Vid. Ord. of *Amſterdam*, *Rotterdam*, *Conningsberg*, *Genoa*, *Stockholm*, &c. as collected by *Magens*.—(*c*) Inf. 103.

At

At what time theſe wager policies firſt came into uſe in this country is not quite certain; but it was probably ſince the revolution. The clauſe "*intereſt or no intereſt,*" does not neceſſarily make the policy a wager. This clauſe was at firſt countenanced in the ſuppoſition that it only amounted to an admiſſion of the intereſt of the inſured, and could have no other effect than to ſave him the trouble and expence of proving his intereſt in caſe of litigation (*a*).

At what time introduced theſe.

In the caſe of *Martin* v. *Sitwell*, which came before the court of King's Bench in the year 1691, it was admitted that where goods are inſured, but it appears that the inſured had none on board, the policy, by the cuſtom of merchants, is void, and the inſurer bound to return the premium.

Martin v. *Sitwell*, 1 *Show.* 156.

The firſt caſe I can find where the validity of an inſurance without intereſt came directly in queſtion in *Weſtminſter Hall*, was in the year 1692.—A bill was filed in the Court of Chancery to have a policy delivered up to be cancelled, upon the ground that the inſured had no intereſt either in the ſhip or cargo.—The inſured had lent 300 l. on bottomry on the ſhip; and, without any other intereſt, inſured 450 l. upon her. The ſhip ſurvived the time limited in the bottomry bond; but was loſt within the time limited by the policy; and the inſured claimed, not only the money due on the bond, but alſo the ſum inſured by the policy.—The court (*b*) decreed the policy to be delivered up to be cancelled, and ſaid,—"Take it, that the law is ſettled, that if a man has no intereſt and inſures, the inſurance is void, although it be expreſſed in the policy, *intereſted or not intereſted.* And the reaſon the law goes upon is, that inſurances are made for the encouragement of trade, and not that perſons unconcerned in trade, nor intereſted in the ſhip, ſhould

In 1692, a policy was ordered to be delivered up to be cancelled, becauſe the inſured had no intereſt.

Goddart v. *Garrett*, 2 *Vern.* 269.

(*a*) Per Cur. in *De Paiba* v. *Ludlow*, 1 *Com. Rep.* 361. —(*b*) The commiſſioners of the great ſeal were, at that time, Sir *John Trevor*, Mr. Serjeant *Hutchins*, and Mr. Serjeant *Rawlinſon*.

profit by them. The reaſon why the law allows, that a man having ſome intereſt in a ſhip or cargo, may inſure more, or five times as much, is, that a merchant cannot tell how much, or how little, his factor may have in readineſs to lade on board his ſhip."

In 1710, a wager policy was admitted in *B. R.* to be a legal contract.

Aſſievedo v. *Cambridge*, 10 *Mod.* 77.

In the courſe of twenty years from this time, this doctrine ſeems to have given place to a contrary ſentiment; for, in 1710 a caſe came before the court of King's Bench, upon a ſpecial verdict, where the queſtion was, whether the inſured upon a policy without intereſt, was entitled to recover as for a total loſs, where the ſhip, having been captured, was re-captured before ſhe was carried *infrà præſidia hoſtium*.—The caſe was argued by civilians; but it was only contended on the part of the defendant, that the inſured, in a *wager policy*, ought not to recover in a caſe where he could not have recovered on a policy *upon intereſt*. It was never objected that the policy was void for want of intereſt; ſo that the legality of wager policies ſeems not to have been at that time doubted. On the contrary, Doctor *Floyer*, in arguing for the plaintiff, inſiſted that, as the policy was a wager, the queſtion whether the capture diveſted the property out of the owners, did not ariſe between the plaintiff and defendant; the only queſtion between them being merely, whether the ſhip was in fact taken.

In 1716, it was holden that the value in the policy ſhould be the true value of the effects inſured.

Le Pypre v. *Furr*, 2 *Vern.* 716.

A few years afterwards, (Mich. 1716), upon a bill for a diſcovery filed in the court of Chancery by the underwriters againſt the inſured, upon a valued policy; the Lord Chancellor ordered the defendant to diſcover what goods he had put on board: For though he offered to renounce all intereſt to the inſurers, yet it was referred to a maſter to examine the value of the goods ſaved, and to deduct it out of the 600 l. at which the goods were valued by the agreement.

Not much can be gathered from the imperfect report of this caſe, except that, in the caſe of a valued policy, the inſured was conſidered as bound, if called upon, to ſhew that goods to the amount of the value in the policy were in fact put on board; from which it may be inferred that

that the court of Chancery, at leaſt, ſtill deemed the policy valid only to the extent of the intereſt of the inſured.

And yet, in the ſame term, a caſe, not unlike that of *Goddart* v. *Garrett* (*a*), came before the ſame court, in which the opinion of the Lord Chancellor ſeems to have proceeded on quite a contrary principle. There it appeared that the defendant had lent the plaintiff 250l. on bottomry, and afterwards inſured the ſhip for the ſame ſum, but for a greater voyage than that which was mentioned in the bottomry bond. The ſhip being loſt, the defendant recovered the money on the policy, and alſo put the bottomry bond in ſuit, the ſhip having, before ſhe was loſt, deviated from the voyage mentioned in the bond.—The plaintiff brought his bill, inſiſting that, as the defendant had no intereſt in the ſhip, but in reſpect of the money lent on bottomry, he ought not to have the fruit both of the bond and the policy, and praying to have the benefit of the inſurance, on paying the premium. —But the Lord Chancellor held that the defendant, having paid the premium, was entitled to the benefit of the policy, as well as of the bond.

In the ſame year it was determined that the lender on bottomry might inſure; and might have the benefit, not only of the bond but of the policy alſo.

Harman v. *Van Hatton*, 2 *Vern.* 717.

The deciſion of this caſe is quite at variance with that of *Goddart* v. *Garrett*, and ſhews that a new doctrine, founded on a new principle, had introduced itſelf into the court of Chancery ſince the year 1692.

In the year 1721, a caſe nearly ſimilar to that of *Aſſkevedo* v. *Cambridge* (*b*), came before the court of Common Pleas.—A ſhip, inſured intereſt or no intereſt, was captured by a pirate, and after nine days, retaken and brought into an *Engliſh* port.—The court determined that the defendant was reſponſible. For though it was objected that the inſurer was only reſponſible where the plaintiff had a property, and that the term of inſuring, intereſt or no intereſt, was introduced ſince the revolution; yet it was ſaid that ſuch inſurance was good, and the import of it was, that, as the defendant could not controvert the

In 1721, it was determined that an inſurance intereſt or no intereſt was good.

De Paiba v. *Ludlow*, 1 *Com. Rep.* 361.

(*a*) Sup. 99.—(*b*) Sup. 100.

intereſt, the plaintiff had no occaſion to prove it.—From this laſt declaration it would ſeem that though the judges were not, at that time, inclined to diſcountenance inſurances in this form, yet they were not quite willing to admit them to be mere wagers.

In 1746, a wager policy was holden to be good.

In 1746, a caſe came before Lord C. J. *Lee* at *niſi prius*, upon a policy without intereſt, on goods.—The ſhip was taken and carried into an enemy's port, from whence ſhe was cut out by an *Engliſh* ſhip eight days after.—The plaintiff inſiſted that this policy, though on goods, was a wager on the bottom of the ſhip, and that he was therefore entitled to recover as for a total loſs. The defendant inſiſted that, as the ſhip and cargo were to be reſtored on paying ſalvage, this was only an average loſs, and the plaintiff could only recover in the caſe of a total one.—But the Chief Juſtice held that the plaintiff ought to recover; for his was a wager upon a total loſs *in the voyage*, and there had happened one by the capture and detention for eight days.

Dean v. *Dicker*, 2 *Str.* 1250. inf. c. 12, § 3.

Theſe are all the early caſes I have been able to find on this queſtion. From the firſt of them it appears that, even ſince the revolution, it was determined that an inſurance without intereſt was void. Afterwards it would ſeem that policies, *intereſt or no intereſt*, which were at firſt, perhaps, inſurances upon real intereſt, became in time only a cloak for mere gaming contracts, were at length openly avowed, and became frequent ſubjects of litigation in the courts of *Weſtminſter*.

More modern deciſions.

In more modern times, our moſt eminent judges have recognized them as legal contracts.—Lord *Mansfield*, in delivering the opinion of the court in the caſe of *Goſs* v. *Withers* (*a*), diſtinguiſhes between wager policies and policies upon real intereſt, in order to ſhew that, in an action upon the former, the plaintiff could only recover in the caſe of a total loſs; but that, upon the latter, the inſured might recover the loſs really ſuſtained, whether total or partial.—In the caſe of *Crauford* v. *Hunter* (*b*),

(*a*) 2 *Bur.* 695, inf. c. 13. § 2.—(*b*) 8 *T. R.* 23, ſup. 85.

Lord

Lord *Kenyon*, and the reſt of the judges of the court of King's Bench were unanimouſly of opinion, that, at common law before the ſtat. *G.* II. c. 37, a perſon might have inſured without having any intereſt in the thing inſured.

Certain it is that this ſpecies of gaming, having thus obtained the ſanction of the law, became, about the year 1746, ſo prevalent, and the evils reſulting from it ſo injurious to the beſt intereſts of this country, that the legiſlature found it neceſſary to interpoſe, and by the ſtat. 19 *G.* II. c. 37, has impoſed ſome wholeſome reſtraints upon it.

At length prohibited.

The preamble recites that, 'Whereas it hath been 'found by experience that the making of inſurances, in-'tereſt or no intereſt, or without further proof of in-'tereſt than the policy, hath been productive of many 'pernicious practices, whereby great numbers of ſhips, 'with their cargoes, have either been fraudulently loſt and 'deſtroyed, or taken by the enemy in time of war; and 'ſuch inſurances have encouraged the exportation of 'wool and the carrying on of many other prohibited and 'clandeſtine trades, which, by means of ſuch inſur-'ances have been concealed, and the parties concerned 'ſecured from loſs, as well to the diminution of the 'public revenue, as to the great detriment of fair tra-'ders; and by introducing a miſchievous kind of gaming, 'under pretence of inſuring againſt the riſk on ſhipping 'and fair trade, the inſtitution and laudable deſign of 'making inſurances hath been perverted; and that which 'was intended for the encouragement of trade and na-'vigation hath, in many inſtances, become hurtful of, 'and deſtructive to the ſame.'—The ſtatute therefore 'enacts (§ 1.), 'That no inſurance ſhall be made on any 'ſhip or ſhips belonging to his Majeſty, or any of his 'ſubjects, or any goods or effects laden on board ſuch 'ſhips, *intereſt or no intereſt*, or, *without further proof of in-'tereſt than the policy*, or, by way of gaming or wager-'ing, or, *without benefit of ſalvage to the inſurer*, and that 'every ſuch inſurance ſhall be void.'

By 19 *G.* II. c. 37, § 1. No inſurance ſhall be made on the ſhips or goods of his Majeſty, or any of his ſubjects, intereſt or no intereſt, &c.

§ 2. Except on privateers.

But, by § 2, 'It is provided, That inſurances on pri-
'vate ſhips of war, fitted out by any of his Majeſty's
'ſubjects, ſolely to cruiſe againſt his enemies, may be
'made by or for the owners thereof, intereſt or no in-
'tereſt, free of average, and without benefit of ſalvage
'to the inſurer.'

§ 3. And except as to effects imported from the dominions of *Spain* or *Portugal*.

And by § 3, it is alſo provided, 'That any effects
'from any port or places in *Europe* or *America*, in the
'poſſeſſion of the crowns of *Spain* or *Portugal*, may be
'inſured in the ſame manner as if this act had not been
'made (*a*)'.

§ 5. Money lent on bottomry or *reſpondentia*, in the *Eaſt Indies* trade, ſhall be lent only on the ſhip or goods, and inſured only by the lender.

By ſect. 5, 'All ſums of money lent on bottomry or
'*reſpondentia*, upon ſhips belonging to his Majeſty's ſub-
'jects, bound to or from the *Eaſt Indies*, ſhall be lent only
'on the ſhip, or on the merchandize or effects on board,
'or to be laden on board, and ſhall be ſo expreſſed in
'the condition of the bond; and the benefit of ſalvage
'ſhall be allowed to the lender, his agents or aſſigns, who

(*a*) The reaſon of this exception is not very obvious. That aſſigned for it is, that *Spain* and *Portugal* have each prohibited all trade between the ſubjects of foreign ſtates and their reſpective colonies in *America*. *Park* 274. But it does not follow from thence that *Britiſh* ſubjects might not import goods from *Spain* and *Portugal*. Certain it is that a great trade is generally carried on with both thoſe countries, by *Britiſh* ſubjects in their own names.—The true reaſon for this exception ſeems to be, that perſons carrying on a contraband trade with thoſe countries, might inſure their goods without diſcloſing the particular commodities of which they conſiſted; which, without this exception, they muſt have done, in order to prove an intereſt. *Emerigon* (vol. i, p. 212) ſays, that the reaſon of this exception in the *Engliſh* ſtatute is ſufficiently obvious: Namely, that the *Engliſh*, who practice ſmuggling in thoſe countries, can obtain no bills of lading, or other evidence of their cargoes. He admits, however, that the ſame practice is permitted in *France*, not *by law*, but by an *evaſion of the law*. Lord *Mansfield* is ſtated by Mr. Juſtice *Buller* to have given nearly the ſame reaſon for this exception. Vid. 2 *T. R.* 165.—Vid. *Thelluſon* v. *Fletcher*, inf. 105.

alone

'alone ſhall have a right to make inſurance on the money 'ſo lent; and the borrower ſhall recover no more on any 'inſurance than the value of his intereſt in the ſhip, or 'in the goods on board, excluſive of the money ſo bor- 'rowed: And in caſe it ſhall appear that the value of 'his ſhare in the ſhip, or in the goods on board, doth 'not amount to the ſum borrowed, he ſhall be reſponſi- 'ble to the lender for ſo much of the money borrowed 'as he hath not laid out in the ſhip or goods on board, 'with intereſt for the ſame, together with the inſurance 'and all other charges thereon, in the proportion which 'the money not laid out ſhall bear to the whole money 'lent, notwithſtanding the ſhip and goods be totally 'loſt.'

The borrower ſhall not recover on any inſurance more than the value of his intereſt in the ſhip and goods, excluſive of the money borrowed. If this do not amount to the ſum borrowed, he ſhall be reſponſible for the deficiency, though the ſhip be loſt.

And, by ſect. 6, 'In all actions brought by the in- 'ſured, the plaintiff, or his attorney or agent, ſhall, within 'fifteen days after he ſhall be required ſo to do, in writing, 'by the defendant or his attorney or agent, declare in 'writing what ſum or ſums he hath inſured, or cauſed 'to be inſured in the whole, and what ſums he hath bor- 'rowed at reſpondentia or bottomry, for the voyage or 'any part of the voyage in queſtion'.

The plaintiff in any action on a policy, ſhall, in fifteen days after requeſt, declare how much he has inſured in the whole, and how much borrowed on bottomry.

The regulations and reſtrictions of this ſtatute, being confined to inſurances on ſhips belonging to his Majeſty and his ſubjects, and to goods or effects laden thereon, inſurances upon the ſhips and goods of foreigners are not within the act, but remain the ſame as before the paſſing of it, as appears by the following caſe.

The reſtrictions of this act do not extend to foreign ſhips, or to goods on board them.

An inſurance was made on goods on board three *French* ſhips, "from *St. Domingo* to *Bourdeaux*, all or "any of them; the goods by agreement to be valued at "a certain ſum; the policy to be deemed *ſufficient proof* "*of intereſt* in caſe of loſs."—The declaration averred that goods, to the amount of the ſum inſured, were ſhipped on board the three ſhips, *ſome or one of them*, and that two of them had been captured, and the other loſt. —After judgment by default, and a writ of inquiry executed, the defendant moved to ſet aſide the inquiſition, on the ground that damages had been aſſeſſed to the full amount

In a policy on a *foreign* ſhip, there is a ſtipulation that the policy ſhall be ſufficient proof of intereſt. Upon a writ of inquiry after judgment by default, the plaintiff need not give any evidence of intereſt.

Thelluſſon v. *Fletcher*, *Doug.* 301.

amount of the defendant's ſubſcription, without any proof of the value, or any other evidence, except the defendant's hand-writing to the policy; and that, in fact, the inſured had no intereſt.—The court held, that this policy was not within the ſtatute, foreign ſhips not being included in it, on account of the difficulty of bringing witneſſes from abroad to prove the intereſt; and that, by ſuffering judgment to go by default, the defendant had confeſſed the plaintiff's title to recover; and the amount was fixed by the ſtipulation in the policy.

An inſurance cannot be made on goods, to depend on the fate of the ſhip.

An inſurance cannot be made upon one thing, to depend on the fate of another. If the ſubject matter of an inſurance be unconnected with the event inſured againſt, the policy, if not altogether nugatory, is at leaſt a wager policy. As if a cargo be inſured, and money be expended in reclaiming it upon the ſhip being captured, and this money be, by the court of Admiralty, made a charge upon the cargo: This cargo cannot be inſured upon the event of the *ſhip's* arrival at her port of deſtination; for this, as to the ſhip, is a mere wager; and as to the cargo, the underwriters are not liable to any peril to which it is expoſed.

Money is expended in reclaiming a cargo on board a captured ſhip, which is made a charge upon the cargo. This money is inſured upon the cargo, upon the event of the *ſhip's* arrival at her port of deſtination. The ſhip being again captured and reſtored upon appeal, relinquiſhes the voyage inſured, and is afterwards loſt.—The policy being on the *goods*, and the inſurance being upon the *ſhip's* arrival,

Thus:—Goods were inſured on board the *Emanuel*, "at and from *Falmouth* to *Marſeilles*, warranted a *Da-* "*niſh* ſhip."—On the policy was this memorandum:— "The following inſurance is declared to be on money "expended for reclaiming the ſhip and cargo, valued at "the ſum which ſhall be declared hereafter. The loſs "to be paid in caſe the ſhip does not arrive at *Marſeilles*, "and without farther proof of intereſt than this policy; "warranted free from average, and without benefit of "ſalvage."—The inſured were proprietors of the *cargo*, but not of the *ſhip*. The ſhip had ſailed originally with the cargo from *Riga* on a voyage to *Marſeilles*, was captured by an *Engliſh* privateer, and condemned.—The ſentence of condemnation was afterwards reverſed, the prize being proved to be a *neutral ſhip*; but the expences were ordered by the Admiralty to be a charge upon the

cargo.

cargo. The plaintiff's agents paid these expences amounting to 1031 l. 14 s., and immediately procured the above insurance to be effected. In *February* 1781, the ship sailed from *Falmouth*, with the orginal cargo on board, in the prosecution of her voyage to *Marseilles*, but was captured by a *Spanish* ship, and carried into *Ceuta*, where she was again condemned. An appeal was brought, and the cargo, being of a perishable nature, was ordered to be sold, and the proceeds brought into court, to wait the event of the suit. In *May* 1783 the ship was restored by sentence of the court of appeal. After deducting the expence of prosecuting the appeal in *Spain*, the surplus, amounting to no more than twenty-six rix dollars, was paid to the owners. As soon as the ship was liberated, she sailed from *Ceuta* to *Malaga* to refit, and having there made the necessary repairs, she sailed for *Bremen*, and in that voyage was lost.—The cargo had been insured at *Bremen*, for the original voyage from *Riga* to *Marseilles*, and the amount of that insurance was paid.—In an action on the above policy, the loss was averred to be by *capture*. On the trial, it was objected, not only that the plaintiffs could not recover, as for a loss by *capture* (*a*), but also that this was not an *insurable interest*; for if the insurers at *Bremen* were answerable for the expences that had been incurred in reclaiming the goods, the present contract would amount to a *double insurance*, and would be consequently void.—The plaintiffs were nonsuited upon these objections; and upon a motion to set aside the nonsuit, the court held both objections to be well founded.—Lord *Mansfield* said,—"The interest on which the plaintiffs effected this policy, was money laid out in reclaiming the *cargo*. The event insured was the arrival of the *ship* at *Marseilles*. A loss accrued upon the *cargo*. The underwriter is sued, and the loss is averred to be by *capture*. The ship was taken by the *Spaniards*, but afterwards restored, and in a condition to pursue her voyage, but was

is a wager, and void.

Kulen Kemp v. *Vigne*, 1 T. R. 304.

(*a*) As to this point vid. *inf.* c. 16, § 2.

lost

loſt *in another voyage.*—This is a wager policy, and juſt the ſame as if the event inſured had been the arrival of any other ſhip at *Marſeilles*. The plaintiffs were intereſted in the *cargo alone*; but the event inſured is the arrival of the *ſhip*, and not of the cargo. There was only a temporary capture, and though this, by conſtruction, is ſuch a loſs, as that an inſured *upon intereſt* is warranted in abandoning at the time, if he pleaſe; yet we muſt conſider what the truth of the caſe was between thoſe parties. Now this was a wager policy, and in ſuch a caſe, there can be no abandonment. But what alone is a fatal objection to the plaintiff's claim is, that they did not attempt to purſue the voyage to *Marſeilles*, which they might have done. Nor is it any excuſe that they could no longer control her deſtination; for in wager policies the inſured take upon themſelves to perform all that the owners could have done in the ſame ſituation."—Mr. Juſtice *Buller* ſaid,—"The parties who were intereſted in the cargo *alone*, inſured the *ſhip*, with which they had no concern. The goods might have arrived ſafe, and the ſhip have been loſt, and then they would have been intitled to recover as for a total loſs; though they had ſuſtained no damage. On the other hand, if the ſhip had arrived, and the goods had been loſt, they could have recovered nothing, though they would have really ſuſtained a damage. The policy, therefore, is not adapted to the real truth of the caſe, but is a wager policy, and that alone is deciſive upon the ground of merits (*a*).

In wager policies the inſured takes upon himſelf to perform all that the owner could have done.

The exception in the third ſection of the act, relating to effects imported from the dominions of *Spain* and *Portugal*, enables the inſured upon that trade, though carried on in *Britiſh* ſhips, to recover without the proof of any intereſt.—Therefore where an inſurance was made, "Upon "any of the packet boats that ſhould ſail from *Liſbon* to

(*a*) It ſeems extraordinary that, if this was taken to be a wager policy on the ſhip, the counſel for the plaintiff did not avail themſelves of her being a *foreign ſhip*, to ſhew that a policy without intereſt upon her was not within the ſtat. 19 *G.* II. c. 37.

"*Falmouth*,

" *Falmouth*, for one year, upon any kinds of goods or " merchandize whatſoever: And it was agreed that the " goods *ſhould be valued at the ſum inſured on ſuch packet* " *boat, without further proof of intereſt than the policy*; " and to make no return of premium for want of intereſt, " being on bullion or goods." The inſured had an intereſt in bullion on board one of the *Liſbon* packets, which was totally loſt within the time mentioned in the policy.—The court held, that this was a policy of a peculiar ſort, and good within the exception of the ſtat. 19 *G.* II. c. 37, § 3 (*a*). That it was a mixed policy, partly a wager policy, and partly an open one; and being a valued policy, and fairly ſo, without fraud or miſrepreſentation, and the loſs having happened, the inſured was entitled to recover as for a total loſs.

A policy "*without further proof of intereſt than the policy*," on goods from *Liſbon*, is good, within the 3d ſection of the act.

Da Coſta v. *Frith*, 4 *Bur.* 1966, *infra* c. 13. § 5.

Though the inſured has an intereſt in the thing inſured, yet if it be ſmall in compariſon of the ſum inſured, the object of the contract will be conſidered, not as an indemnity, but as a wager; and its being made in the form of a ſpecial agreement, will not take it out of the ſtatute.

A ſmall intereſt will not take a caſe out of the ſtatute.

Thus, where an action was brought by the ſurgeon of an *Eaſt Indiaman*, againſt a paſſenger, upon a ſpecial agreement, " that, in conſideration that the plaintiff had agreed to pay the defendant 20 l. at the next port the ſhip ſhould arrive at, the defendant undertook that the ſhip ſhould ſave her paſſage to *China* that ſeaſon; and in caſe ſhe did not, he would pay the plaintiff 1000 l. at the end of one month after the ſhip's arrival in the *Thames*."—The defendant paid the 20 l. into court.—At the trial it appeared, that the plaintiff had paid the defendant the 20 l. at the next port; that the ſhip, being delayed below *Madras*, in conſequence of a miſcalculation of five days in the reckoning, and the monſoons ſetting in earlier than uſual, ſhe loſt her paſſage: That the plaintiff had *ſome goods* on board, which were liable to ſuffer by the loſs of the ſeaſon: That while the matter remained doubtful, the plaintiff, by the deſire of the captain, would have cancelled the agreement, but the

An agreement, in conſideration of 20 *l.* to pay 1000 *l.*, if a ſhip did not ſave her paſſage to *China*, is a wager inſurance within the act, though the party have *ſome* goods on board.

Kent v. *Bird*, *Cowp.* 583.

(*a*) Sup. 104

defendant

defendant poſitively refuſed.—The jury found a verdict for the plaintiff, damages 980 l.—Upon a motion for a new trial, it was contended, on the part of the defendant, that this was a wager inſurance within the ſtat. 19 *G.* II. c. 37, and of this opinion were the court.—Lord *Mansfield* ſaid,—"The ſtatute, under general words, prohibits all contracts of inſurance by way of *gaming* or *wagering*.—Here the plaintiff gave ſo much to the defendant, in conſideration that if the ſhip ſhould not ſave her paſſage to *China*, he was to receive 1000 l. on her ſafe return to *England*.—This was clearly *wagering*; and, if it were allowed, all wager policies would be turned into this form, and the act be entirely defeated."

A valued policy is often only a colour for a wager one.

In a valued policy, the proper effect of the valuation is the fixing the amount of the prime coſt, in the ſame manner as if the parties had admitted it at a trial; but, for every other purpoſe, it muſt be taken that the value was fixed in ſuch a manner, as that the inſured meant to have an indemnity only, and no more (*a*). And though this, when fairly made, is diſtinguiſhable from a wager policy, where the inſured has avowedly no intereſt at all; yet it too often happens that, under colour of a ſmall intereſt, and in the form of a valued policy, many inſurances which are, in truth, mere wagers, are effected, and the beneficial purpoſes of the ſtat. 19 *G.* II. c. 37, thereby evaded.

But though it has been holden that, in the caſe of a valued policy, the inſured, to take it out of the ſtatute, needs only to prove *ſome* intereſt, without ſhewing the amount, becauſe that is admitted by the inſurer; yet, if it appear that the intereſt proved is a mere cover to a wager, as that a man who inſures for 2000 l. has intereſt on board to the value of a cable only; this would be a mere evaſion, and the contract unqueſtionably void (*b*).

But where the inſurance is meant as an indemnity, and not a wager, a valued policy is not within the act.

But where the inſurance is fairly meant as an indemnity, and there is no ground to believe that it is intended

(*a*) *Per* Lord *Mansfield*, 2 *Bur.* 1171. Vid. inf. c. 7. § 1.—(*b*) *Per* Lord *Mansfield* in *Lewis* v. *Rucker*, 2 *Bur.* 1171. inf. c. 14. § 2.

as a cover to a wager, a valued policy is not within the ſtatute; and the courts will not enquire very minutely whether the valuation be very near the true intereſt of the inſured.

In the caſe of *Le Cras* v. *Hughes*, which has been already particularly noticed (*a*), the court of King's Bench ſeems to have carried this indulgence much farther, when they declared that in caſes where the intereſt of the inſured is leſs than the ſum inſured in a valued policy, it is the conſtant uſage, upon a *total loſs*, to pay the whole ſum inſured; but, upon a *partial loſs*, to conſider it as an *open policy*, and to compute the loſs according to the value of the *goods on board*.—That ſuch has been the uſage is unqueſtionably true, and that it has been ſanctioned by the approbation of great and eminent judges, as in the caſe alluded to, is equally true: But how it can be reconciled with the proviſions of the ſtat. 19 G. II. c. 37, is not quite ſo clear. That this practice has a direct tendency to intereſt the inſured, if not in procuring fraudulent loſſes, at leaſt to endeavour to convert every loſs into a *total one*, is moſt manifeſt. In the following caſe this doctrine ſeems to have been carried ſtill farther; a value being ſet in the policy upon a mere contingency.

The practice of permitting the inſured upon a valued policy to recover the whole ſum inſured, upon a total loſs, though his intereſt be leſs than that ſum, is againſt this ſtat. 19 G. II. c. 37.

An inſurance was made, "Upon any kind of goods and merchandizes, &c. and upon the body of the ſhip *Providence*, at and from *Surinam* to *Quebec*. The ſaid goods and merchandizes, for ſo much as concerns the inſured, by agreement are valued at 1000 l. *being the profits expected to ariſe on the cargo of the above ſhip, in the event of her ſafe arrival at Quebec*; and, in caſe of loſs, the inſurers agree to pay the ſame, without any other voucher than the policy."—The intereſt proved at the trial was the *profit*, to the amount of the ſum inſured, which would have ariſen to the plaintiff, upon a cargo of molaſſes, he having a contract with government to ſupply the army in *Canada* with ſpruce beer.—It was objected at the trial, that this was a wager policy, within the ſtat. 19 G. II. c. 37.—This point being reſerved for the

A valued policy on profits expected upon a voyage, is not within the act, the object of the inſurance being an indemnity.

Grant v. *Parkinſon*, M. 22 G. III. B. R. MS.

(*a*) Sup. 84.

opinion

opinion of the court, it was determined in favour of the plaintiff.---Lord *Mansfield*, in delivering the opinion of the court, ſaid,---"On the conſtruction of the act, a valued policy is not void. Since the act, it is incumbent on the plaintiff to prove *ſome intereſt*, but it is not neceſſary for him to go into the whole value. The inſurance being on the profits of a cargo (*a*) belonging to a man having a contract to ſupply the army, if it had arrived ſafe, the profits were pretty certain. The meaning of the policy was, not to evade the act, but to avoid the difficulty of going into an exact account of the *quantum*. This can not be diſtinguiſhed from a valued policy, and there is no pretence to ſay that it was a wagering one (*b*)."

So, a valued policy on a commiſſion expected as conſignee of a cargo, is not a wager.

So, where the intereſt was declared by the policy to be *on the commiſſion of the plaintiff*, as conſignee of the cargo, valued at 1,500 l., Lord *Kenyon* expreſſed a very ſtrong opinion that this was a good inſurable intereſt.

Flint v. *Le Meſurier*, at *N. P.* after *Hil.* 1796. *Park* 268.

Sect. 3.

Of Re-inſurance.

If an inſurer deſire to be relieved from his reſponſibility, he may re-inſure the ſame riſk.

A POLICY of inſurance being once ſigned, the underwriters are bound by the terms of it; nor can they be releaſed from their contract, without the conſent of the inſured (*c*). But if an underwriter repent of what he has done; if he be afraid to encounter the riſk he has engaged to run, or find that he has incautiouſly engaged himſelf to a greater amount than he may be able to diſcharge, he may ſhift it, or part of it, from himſelf to other inſurers, by cauſing a *re-inſurance* to be made on the ſame riſk, upon the beſt terms he can, and the new

(*a*) The inſurance was, in fact, on the *ſhip and cargo*, but declared in the policy to be on the profits expected upon the cargo.---(*b*) One principal objection to this determination is that, if the cargo ſhould happen to come to a falling market, and the goods ſhould be ſold at prime coſt, the policy muſt appear to have been without intereſt.---(*c*) 1 *Emerigon*, 8. *Roccus*, h. t. n. 12.

inſurers

inſurers will be reſponſible to him in caſe of loſs, to the amount of the re-inſurance (*a*). But the new inſurers, in ſuch caſe, are anſwerable to the original underwriter only, and not to the original inſured, who can have no remedy againſt him, in caſe of loſs, even though the original inſurer become inſolvent; becauſe there is no privity of contract between the original inſured and the re-inſurers. If, therefore, the original inſurer fail, ſo that the original inſured receive only a dividend, however ſmall, the re-inſurer can gain nothing by this, but muſt pay the full amount of the loſs to the original inſurer (*b*). *Aſſecurator poſt factam aſſecurationem poteſt ſe aſſecurari facere ab alio aſſecuratore; et iſte ſecundus aſſecurator tenetur pro aſſecuratione facta à primo, et ad ſolvendum omne totum quod primus aſſecurator ſolverit, et iſta ſecunda aſſecuratio valet (c).*

But the re-inſurer is only reſponſible to the original inſurer and not to the original inſured.

Thus ſtands the law on this ſubject, in moſt of the commercial ſtates of *Europe*. But in this country it was found, about the time when the ſtat. 19 *G.* II. c. 37 was made, that this mode of inſurance, though perfectly reaſonable, when confined to its proper object, had been perverted from its original uſe, and was employed as a mode of ſpeculating in the riſe and fall of premiums; and the legiſlature foreſeeing that it might be uſed as a colour for wager policies, and a means of evading the proviſions of that act, declares, (ſect. 4.) 'That it ſhall 'not be lawful to make re-inſurance, unleſs the inſurer 'ſhall be inſolvent, become bankrupt (*d*), or die; in either 'of which caſes, ſuch inſurer, his executors, adminiſ-

But in *England*, by the 19 *G.* II, c. 37, § 4, re-inſurances are prohibited, except in caſe of the inſolvency or death of the original inſurer.

(*a*) Vid. *Le Guidon*, c. 2, art. 19, 20. *Valin*, h. t. art. 20, p. 65. *Pothier*, h. t. n. 96.—(*b*) Vid. *Emerig.* tom. 1, p. 248. —(*c*) *Roccus*, h. t. n. 12.—(*d*) By the 19 *G.* II, c. 32, § 2. 'When the obligor in any bottomry or *reſpondentia* bond, and 'the inſurer in any policy of inſurance, becomes bankrupt be-'fore any loſs happens, the obligee in ſuch bond, and the in-'ſured in ſuch policy of inſurance, may prove their debts and 'loſſes under the commiſſion, and receive a dividend; and the 'bankrupts ſhall be diſcharged from ſuch debts, in like manner 'as if the loſs had happened before ſuch bankruptcies.'—Vid. *inf.* c. 16, § 6, art. 5.

'trators, or aſſigns, may make re-inſurance to the amount 'of the ſum before by him inſured; provided it be ex- 'preſſed in the policy to be a re-inſurance.'

This clauſe extends not only to *Britiſh*, but alſo to foreign ſhips.

This clauſe, having no words to confine its operation to ſhips belonging to *Britiſh* ſubjects, like the firſt clauſe of the act, reſtraining inſurances, *intereſt or no intereſt* (*a*), extends to re-inſurances made in *England* on foreign ſhips, even when they are inſured abroad. This has been ſo determined; though it is obſervable that the following caſe, in which that queſtion was made, was not the ſpecies of re-inſurance above deſcribed, and to which only the ſtatute refers, but a *ſecond inſurance*, effected on account of the *original inſured* (*b*).

Therefore a ſhip inſured at *Marſeilles* cannot be again inſured here, unleſs the firſt inſurer be inſolvent or dead.

That was the caſe of an inſurance made in *London*, on a *French* veſſel, which had before been inſured at *Marſeilles* for the ſame ſum, by an inſurer there, who, at the time of ſubſcribing the ſecond policy, was living and ſolvent, and who, in fact, afterwards paid the ſum inſured by him.—Upon this caſe the court determined that the latter policy, was void by the words of the act; for though the firſt clauſe of the act, which prohibits inſurances, 'intereſt or no intereſt,' is confined to inſurances on *Britiſh* ſhips, yet the fourth ſection being general, and without any ſuch reſtrictive clauſe, every re-inſurance in this country, either by *Britiſh* ſubjects or foreigners on *Britiſh* or foreign ſhips, is declared void by the ſtatute, unleſs the firſt inſurer be inſolvent, become bankrupt, or die.

Andreé, v. *Fletcher*, 2 T. R. 161.

Two other kinds of re-inſurance.

There are two other kinds of re-inſurance; the one where the inſured inſures the ſolvency of the inſurers; the other, where he makes a new inſurance in conſequence of the inſolvency of an inſurer during the continuance of the riſk.

Inſurance of the ſolvency of the inſurer.

The inſurance of the ſolvency of an inſurer is permitted and practiſed in ſome foreign countries (*c*); but it ſeems never to have been in uſe among us; not, perhaps, as has been ſuppoſed (*d*), becauſe the ſolvency

(*a*) Sup. 103.—(*b*) Vid. inf. 118, where Lord *Mansfield* diſtinguiſhes a re-inſurance from a double inſurance.—(*c*) Vid. *Le Guidon*, c. 2, art. 20, Ord. of *Louis*, XIV. h. t. art. 20, *Valin*, h. t. 65, 2 *Magens*, 190, 419.—(*d*) *Park*, 280.

of

of an underwriter is not an insurable interest, or that such an insurance would be deemed a wager; but, more probably, because the insolvency of an insurer seldom happens in *England;* besides, a *double insurance* would better answer the end proposed.

The practice in *France* in case of the insolvency of an insurer.

In *France*, if an insurer fail during the continuance of the risk, the insured may insist on the dissolution of the contract, unless the creditors of the insolvent insurer, in order to entitle themselves to receive the premium, (which is rarely paid in that country till after the risk is ended), will give security for the payment of the sum insured, in case of loss. At *Marseilles*, (for in *France* different practices prevail in different provinces), the insured, in such case, sues the insolvent insurer till he obtains a sentence authorizing him to re-insure at the expence of the insolvent, which he may deduct from the stipulated premium, if it be not paid; and if this be insufficient, then out of the effects of the insolvent (*a*).

Sect. 4.

Of Double insurance.

How double insurance differs from re-insurance.

DOUBLE insurance is where the insured makes two insurances on the same risk, and the same interest. It differs from a re-insurance in this, that it is made by the *insured*, in order that he may be entitled to receive a double satisfaction in case of loss; whereas a re-insurance is made by a former insurer, his executors or assigns, to protect himself and his estate from a risk to which they were liable by the first insurance. A re-insurance, except in the cases permitted by the stat. 19 *G.* II. c. 37, § 4, is absolutely void; but a double insurance, though it be made with a view to a double satisfaction in case of loss, and is therefore in nature of a wager, is not void by the law of *England*. The two policies are considered as making but *one insurance*. They are good to the extent

Though it is in nature of a wager, yet it is not void. But the insured can only recover one satisfaction on both policies.

(*a*) *Valin*, h. t. art. 20, p. 65. *Pothier*, h. t. n. 190. *Emerig.* tom. 1, p. 254.

of the value of the effects put in risk: But the insured shall not be permitted to recover a double satisfaction. He may sue the underwriters on both the policies, but he can only recover the real amount of his loss, to which all the underwriters shall contribute in proportion to their several subscriptions. And therefore, if he should content himself with suing only on one of the policies, the underwriters on that policy may recover a rateable contribution from those on the other (*a*).

Those who pay the loss may recover a rateable proportion from the other insurers.

Newby v. *Reed*, at *N. P.* 1 *Bl.* 416.

This was so ruled by Lord *Mansfield*, in the year 1763; and it was then agreed to be the course of practice, that, upon a double insurance, though the insured is not entitled to two satisfactions; yet, that in an action upon the first

(*a*) *Le Guidon*, ch. 2, art. 16 and 18, ch. 3, art. 3, lays it down that if there be several policies on the same cargo, those of prior date shall be preferred. If there be an over-insurance in one policy, it shall not be reduced rateably upon all, but the latter insurers, whether for gain or loss, shall withdraw their subscriptions, on receiving one half *per cent.* The Ord. of *Amsterdam*, art. 20, 23, agrees with the law of *England* in this; that all the insurers, upon several policies, shall participate equally in profit and loss.—The Ord. of *Louis* XIV. h. t. art. 23, 24, 25, declares that if the sum insured by a *single policy*, without fraud, exceed the value of the goods, the policy shall be good to the extent of their true value: and in case of loss, every insurer shall contribute in proportion to his subscription, and return the premium upon the surplus. If the insurance be by several policies, and the first amount to the value of the goods, it shall stand alone, and the underwriters upon the others shall be discharged, and *return the premium*, subject to the usual deduction.—If the first policy be not sufficient to cover the full value, the second shall answer for the deficiency.—If there be several *dates* to the several subscriptions in the same policy, each date makes a separate contract, and ascertains the liability of each underwriter. But if several policies have the same date, they make but one policy; Vid. *Valin* sur art. 24, &c. p. 69, *Pothier*, h. t. n. 77, *Cleirac*, p. 243, *Emerig.* tom. 2, p. 163.—Vid. also *Mal.* lex merc. 118, where he lays it down that if the effects be over insured, the loss shall fall on the first underwriters, and the rest shall return their premium, deducting one half *per cent.* This, he says, is founded on the custom of merchants, which in matters of insurance is more to be regarded than the law. Vid. inf. c. 15. § 1. n. 1.

policy,

policy, he may recover the whole sum insured, and may leave the defendants therein to recover a rateable satisfaction from the other insurers.

The two following cases will also serve to shew Lord *Mansfield's* sentiments more fully on this subject.

The first was a valued policy on a ship and freight, and on goods, as interest might appear, from *Newfoundland* to *Dominica*, and from thence to the port of discharge in the *West Indies*.—The ship sailed from *St. John's* on the 19th of *December* 1775, and the plaintiff declared as for a total loss. The defendant underwrote for 200 l. and paid into court 124 l. This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at *Liverpool*, on a voyage "from *Newfoundland* to *Barbadoes* and the *Leeward Islands*," with an exception of *American* captures; but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance.—The plaintiff now insisted, that he was entitled to receive the full amount of his insurance against the defendant, and not to any part from the *Liverpool* underwriters, because the voyage now insured was different from that insured at *Liverpool* (*a*). There was a verdict for the plaintiff for his full demand, *leaving the defendant at liberty to bring an action against the* Liverpool *underwriters, if he thought fit.*

Rogers v. *Davis*, at *N. P.* in *Mich.* 17 *G.* III. *Beawes*, lex merc. 242.

Accordingly in the *Easter* term following, *Davis*, who had been the defendant in the last action, brought an action against the present defendant, who was an underwriter upon one of the *Liverpool* policies, in order to recover a contribution for the loss which the present plaintiff had been obliged to pay.—It was agreed by both parties to admit, that on the *London* policy, (which was the subject of the former action), 2200 l. were insured: That on the two *Liverpool* policies 1700 l. were insured: That the merchant was interested to the amount of 500 l. on

An underwriter who has paid a loss upon one policy, may sue the underwriters on the other for contribution.

Davis v. *Gildart*, at *N. P.* after *Easter* 17 *G.* III. *Beawes* ub. sup.

(*a*) This fact does not seem to have been much regarded either in this or the following case.

the ſhip, 300l. on the freight, and 1400l. on the cargo: That the plaintiff had paid 200l. loſs, and 47l. for the coſts. The whole intereſt was 2200l., and the whole inſurance was 3900l.—The queſtion was, whether the defendant was liable to contribute any thing, and what. It was inſiſted by the counſel for the defendant, that the inſurance in *London* was an illegal *re-inſurance*; and therefore the plaintiff might have made a good defence in an action brought againſt him: And if ſo, he could not now recover over, againſt the defendant, in the preſent action.—Lord *Mansfield* ſaid,—"The queſtion ſeems to be whether the inſured has not two ſecurities for the loſs that has happened. If ſo, can there be a doubt that he may bring his action againſt either? It is like the caſe of two ſureties; where, if all the money be recovered againſt one of them, he may recover a proportion from the other. Then this would bring it to the queſtion, whether the ſecond inſurance is void as a *re-inſurance*. But a re-inſurance is a contract made by the inſurer to ſecure himſelf; *and this is only a double inſurance.*"

Formerly in the caſe of an *over inſurance*, the firſt underwriters were liable to the extent of the loſs, and the reſt diſcharged.

Yet, from the following deciſion it will appear, that, in the caſe of an *over-inſurance*, that is, where, in a ſingle policy, the ſums ſubſcribed amount to much more than the value of the effects inſured, the firſt underwriters on the policy were formerly holden to be anſwerable, to the extent of the loſs, and the ſubſequent ones diſcharged.

The *African Company* v. *Bull*, 1 *Show.* 132, *Gilb.* 238.

To an action brought on a policy on goods, the defendant pleaded a *cuſtom of merchants*,—"That where a policy is ſubſcribed by a number of underwriters, and the goods are not equal in value to the ſums ſubſcribed, the underwriters, in caſe of loſs, ſhall be liable in the order in which they ſubſcribe; and that the remaining underwriters ſhall be exonerated from all reſponſibility, and return the premium, deducting one half *per cent.*" The plaintiff replied that this was ſo, if none were inſolvent, and traverſed the cuſtom as pleaded.—It is ſtated that at the trial the cuſtom was proved plainly and fully, "*by all the Exchange*;" and the court held the cuſtom reaſonable, and judgment was given for the defendant.

It appears from the argument of this caſe, that ſuch inſurances are made when a merchant does not know whether

whether his factor will send home any goods, or how much.—But the custom here proved *by all the Exchange* seems now to be forgotten; for at present the underwriters, upon a policy in which there is an over-insurance, would be held all liable in proportion to their several subscriptions, without any regard to priority of dates.

Though only a single satisfaction can be recovered on a double insurance by the same person, yet different persons may insure the same thing, and each recover the full value of the thing insured.

Though the same person cannot, upon a double insurance of his full interest, by different policies, recover more than one satisfaction; yet, according to the following case, if the same person be not to have the benefit of both policies in all events, it cannot be deemed a double insurance; and different persons may insure the same thing upon distinct interests, to the amount of such interests, even to the full value of the thing insured, and each may recover to that amount (*a*).

A., at *Petersburgh*, being considerably indebted to *B*, his correspondent in *London*, ships goods to *B.*, and promises to send him the bill of lading.—*B.* on this, insures 1400 l. on these goods. Afterwards *A.* informs him that he has shipped goods for *London*, and desires him to insure, and re-insures 900 l., in all 2300 l. on these. After this, *A.* having shipped the goods, indorses the bills of lading to *C.* at *Petersburgh*, who sends them to his correspondent in London, with directions to insure the whole *D.* accordingly insures 2300 l. for *C.* with different insurers, and gives them notice of the former insurances on the same goods by *B.*

Meybohm, a merchant of *Petersburgh*, corresponded with *Amyand* of *London*, to whom he was considerably indebted. *Amyand* sent a ship to *Petersburgh* for goods, which *Meybohm* sent, and promised to send the bill of lading by the next post, but never sent it. *Amyand* insured 1400 l. with private underwriters on these goods, on or before the 28th of *September*. In *October* he received a letter from *Meybohm*, dated the 7th of *September*, informing him that he should send him goods as *per* invoice, and desiring him to insure; and 900 l. were insured in consequence. The two insurances, therefore, amounted to 2300 l. on goods. After sending this letter, *Meybohm* indorsed the bills of lading to one *Tamesz*, who sent them indorsed to *Uhthoff*, his correspondent in *London*, desiring him to insure the *whole*. *Uhthoff* received the bills of lading on the 15th of *November*, and then insured with the defendants, (the *London* assurance company), for 2300 l. "at and from the *Sound* to *London*," acknowledging that there had been a former consignment of the goods, and an insurance thereon, and that both parties were willing to be safe.—In the voyage, the ship and cargo were totally lost.—An action was brought by the plaintiffs, as trustees of *Tamesz*, against the defendants on their policy, and a verdict was found for the plaintiff for the whole sum insured by *Tamesz*, subject to the opinion of the court upon the above case.—The question was, whether

(*a*) Vid. sup. 80.

The goods are totally loſt in the voyage.—*C.* ſhall recover on *his* inſurance the *whole* ſum inſured, notwithſtanding *B.*'s inſurance, who had alſo an inſurable intereſt.

Godin & al. v. *Lond. Aſſur.* 1 *Bur.* 489, 1 *Bl.* 103.

the plaintiffs, as truſtees for *Tameſa*, ought to recover the whole, or only half the ſum inſured.—The court were unanimouſly of opinion, that the plaintiff was intitled to recover *the whole*.—Lord *Mansfield* delivered the opinion of the court to this effect.—"As between the inſurer and the inſured, upon the foot of commutative juſtice merely, the inſurers were bound to pay the inſured the whole; for they have received a premium for the whole riſk. If the inſured is to receive but one ſatisfaction, natural juſtice ſays, that the ſeveral inſurers ſhall, all of them, contribute *pro rata*, to ſatisfy that loſs againſt which they have inſured. When a man makes a double inſurance of the ſame thing, by diſtinct policies, yet he ſhall only receive a ſingle ſatisfaction for the ſame loſs. And this holds, though one or both the policies be in the names of other perſons; for the ſame perſon is to have the benefit of both. And if the whole ſhould be recovered from one, he ought to ſtand in the place of the inſured, to receive contribution from the other, who was equally liable to pay the whole. But in this caſe, if *Tameſa* was not to have the benefit of both policies in all events, then it never can be conſidered as a double inſurance. Suppoſing, as it has been ſaid, that by the indorſement of the bills of lading, *Tameſa* ſtood in the place of *Meybohm*, in reſpect of the inſurances; yet *Amyand* had an intereſt of his own, and inſured 1000*l.* on ſhip and goods, prior to any directions from *Meybohm*. Various perſons may inſure various intereſts on the ſame bottom; as one perſon for goods, another for bottomry, &c. Here *Amyand* had a *lien* on theſe goods, as a factor, to whom a balance was due; and he had the ſole intereſt in the ſhip, which was a part of the things inſured. Beſides, *Amyand* does not admit that the inſurance in *October* was made on account of *Meybohm*: On the contrary, he inſiſts upon it for his own benefit. But ſuppoſing *Amyand* had made the inſurance for *Meybohm*, merely as his agent, yet, even then, *Tameſa* can neither come againſt *Amyand*'s underwriters, nor come at his policy: For *Amyand*, the factor of *Meybohm*, has poſſeſſion of the policy, and appears to have been his creditor upon the balance of accounts. And it is now a ſettled point, that *a factor to whom*

If the whole loſs be recovered from one inſurer, he ought to ſtand in the place of the inſured, to receive contribution from the others.

But various perſons may inſure various intereſts on the ſame bottom.

A factor to whom a balance is due, has a lien

whom a balance is due, has a lien on all goods of his principal, so long as they remain in his possession (a). So that *Amyand*, even as factor to *Meybohm*, and making the insurance on his account, is yet intitled to retain the policy, having a lien upon it, while it is in his possession, for the balance due to him from *Meybohm*.---And *Tamesz* must have paid this balance, before he could have gotten *Amyand*'s policy out of his hands; and consequently he was far from being intitled to it as a *cestui que trust*, absolutely and entirely.---But even if this were doubtful, yet *Tamesz* insured under the express declaration of his suspicion that there might have been a former insurance upon the goods by some other person; but desired to insure the whole for his own security; and to this the defendants agreed, and took the whole premium. It would therefore be neither just or reasonable, that *Tamesz* should recover only half his loss from the defendants, and be turned round for the other half to the uncertain event of a long and expensive litigation. *Tamesz*, therefore, has a right to recover the whole loss from the defendants. For though here be two insurances, yet it is not a double insurance. A double insurance is, where a full value of interest is insured on different policies by the same man. Two persons may insure different interests, in the same thing, each for the whole value. *Tamesz* is entitled to receive the whole from the defendants, whatever shall become of *Amyand*'s policy; and they will have a right, in case he can claim any thing under *Amyand*'s policy, to stand in his place, for a contribution to be paid by the other underwriters. Therefore, upon these grounds, in every light in which the case can be put, we are all clearly of opinion, that the verdict is right *for the whole*."

on all goods of his principal in his hands, and may retain the policy.

It would seem that an underwriter, who insures with notice of a former insurance, shall be liable to the whole loss.

Distinction between two insurances on different interests, and a double insurance.

To enable the defendant, in an action on a policy, to discover whether there be a double insurance, he may, by the authority of the stat. 19 *G.* II. c. 37, § 6, call upon the plaintiff to declare in writing, what sums he has insured in the whole, and how much he has borrowed on bottomry or *respondentia*.

A defendant sued on a policy may oblige the plaintiff to declare how much he has insured in the whole.

(a) Vid. *Kruger* v. *Wilcox*, *Amb.* 252.

CHAP.

CHAP. V.

Of the Voyage.

HAVING ſhewn who may be parties to this contract, what may be the ſubject matter of it, and what intereſt the inſured muſt have therein, we now proceed to enquire, upon what *voyage* an inſurance may be legally made.

What is meant by the voyage in inſurance.

By the voyage, is here meant, the paſſage of a ſhip upon the ſeas, from one port to another, or to ſeveral ports. The voyage, with reference to the legality of it, is ſometimes confounded with the *traffic* in which the ſhip is engaged; and is frequently ſaid to be illegal, only becauſe the trade is ſo (*a*). But a voyage may be perfectly lawful, and yet the tranſport of certain goods on board the ſhip may be prohibited; or the voyage may be illegal, though the tranſport of the goods be lawful. It has therefore been thought proper to diſtinguiſh the voyage from the commerce carried on by it, with reference to the legality or illegality of each; and as the ſubject of inſurances upon illegal commerce has been already conſidered in its proper place (*b*), it will be our principal buſineſs in the preſent chapter to ſhew, what voyages are, in themſelves, unlawful; and in what reſpect the illegality of a voyage affects inſurances upon the ſhip, or the goods on board.

General rule.

Upon this ſubject, as upon that of illegal commerce, it may be laid down as a general rule, that no inſurance can be legally made upon any voyage undertaken contrary to the laws of this kingdom, or to thoſe of its dependencies, or to the law of nations. And it is immaterial whether the inſurer was or was not informed, that the voyage was illegal. The law would be inconſiſtent with

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(*a*) When the contract is void on account of the illegality of the commerce, vid. ſup. ch. 3, § 1, 2, 3, 4, 5.—(*b*) Vid. ſup. ch. 3, § 1, 2.

itſelf,

itſelf, were it to lend its aid to enforce the performance of a contract, made in contravention of the law (*a*).

Therefore an inſurance upon any ſhip or goods, for a voyage undertaken contrary to the laws made for the encouragement and protection of the *Britiſh* navigation and commerce, would be void.

An inſurance upon a voyage undertaken contrary to the navigation laws, is void.

The laws made for ſecuring to the *India* company the monopoly of the trade to the *Eaſt Indies*, prohibit the ſhips of any other *Britiſh* ſubjects from ſailing beyond the *Cape of Good Hope*, without a licenſe from the company, and alſo prohibit the exportation of the goods of *Britiſh* ſubjects, in foreign ſhips, to the *Eaſt Indies*. Any inſurance, therefore, of any ſhip or goods, for a voyage undertaken in contravention of theſe laws, is void.---Indeed the excluſive trade of the company is ſo interwoven with the general intereſts of the ſtate, that it is not now to be conſidered ſo much the private right of a corporation, as a great national concern, the infringement of which is a public miſchief, and a public wrong, and as ſuch, is prohibited by the common law (*b*).

So, if it be upon a voyage prohibited by the laws made for the protection of the monopoly of the *Eaſt India* company.

In treating on the ſubject of inſurances on illegal commerce, it has been ſhewn (*c*) that though, ſince the ſtat. 9 and 10 *W.* III. c. 52, many acts of parliament have been made, from time to time, ſince that ſtatute, for the regulation of the *Eaſt India* trade, and for the more effectually ſecuring the monopoly of that trade to the company, yet that act has never been wholly put an end to. And though ſuch parts of it as inflicted penalties, &c. have been repealed by the ſtat. 33 *G.* III. c. 52; and though this laſt act has provided that no acts, or parts of acts, thereby repealed, ſhall be pleaded or ſet up in bar of any action, &c.; yet it is competent to the underwriters who have ſubſcribed a policy on a ſhip trading to the *Eaſt Indies* in contravention of the ſtat. 9 and 10 *W.* 3,

Though the *penalties* of the 9 & 10 *W.* III. c. 44, have been repealed, by the 33 *G.* III. c. 52, yet a policy on a voyage undertaken in contravention of that act is void.

(*a*) Vid. *Bynk.* quæſt. jur. pub. lib. 1, c. 21. *Roccus*, n. t. n. 21, ſeems to entertain a contrary opinion.—(*b*) Vid. *Camden* v. *Anderſon*, 1 *Boſ.* and *Pul.* 272.—(*c*) Sup. c. 3, § 1, 2.

to

to avail themſelves of ſuch illegality, in defence to an action on ſuch policy. This was determined in the caſe of *Camden* v. *Anderſon* already cited on the ſubject of illegal commerce (*a*). It needs ſcarcely to be added, that the ſame principle upon which the inſurance in that caſe was held to be void, is equally applicable to an inſurance upon a *voyage* undertaken in contravention of the laws above referred to.

Under the treaty allowing the *Americans* to trade to the *Britiſh* colonies in *India*, it is not neceſſary that this trade ſhould be carried on between *America* and *India direct*, but may be carried on *circuitouſly*, by the way of *Europe*.

By the treaty between *Great Britain* and the *United States* of *America*, concluded in the year 1795, and confirmed by the ſtat. 37 *G.* III. c. 97, it is agreed,—'That the citi-'zens of the *United States* ſhall be received into the ports 'and harbours of the *Britiſh* territories in the *Eaſt Indies*, 'and may freely carry on trade between the ſaid territo-'ries and the *United States*, in all articles of which the 'exportation or importation to or from the ſaid territories 'ſhall not be entirely prohibited.'—It then adds ſeveral regulations under which this trade may be carried on, one of which is,—'That the veſſels of the *United States* 'ſhall not carry on any part of the coaſting trade of the 'ſaid territories; but veſſels going with their original 'cargoes from one port of diſcharge to another, are not 'to be conſidered as carrying on the coaſting trade.'—From the following caſe it will appear, that, under this treaty, it is not neceſſary that this trade ſhould be carried on from *America* to the *Britiſh* ſettlements in the *Eaſt Indies direct*; but that it may be carried on *circuitouſly* by the way of *Europe*.

An *American* ſhip, the property of B. and C. both *Britiſh* born ſubjects, but naturalized in *America*; (B. before, and C., who was captain, after the declaration of independence), ſails to *France* with a cargo of goods, there diſpoſes of them, and purchaſes goods for *India*; then ſails to *Madeira*, where ſhe takes in the

Three inſurances were made; the *firſt*, on the 29th of *February* 1796, averred to be for the uſe of one *John Collet*, upon the *American* ſhip *Argonaut*, and cargo, "At "and from *Bourdeaux* to *Madeira* and the *Eaſt Indies*, "and from thence to *America*, with liberty to touch, "ſtay, and trade, at all ports and places whereſoever, on "her outward and homeward voyages." The *ſecond*, on the 28th of *May* 1796, for the uſe of *Collet*, on the ſame ſhip and goods, "At and from *Bourdeaux* to the *Eaſt*

(*a*) Vid. ſup. 56.

"*Indies*,

"*Indies*, with liberty to touch, call, and trade at all ports, "places, or iſlands whatſoever, as well at the *Cape of* "*Good Hope*, as on this and the other ſide of it, until her "arrival at her port of diſcharge in *Bengal*." This policy, by a memorandum, was declared to be on wines and brandies, warranted neutral. The *third*, on the 15th of *Auguſt* 1796, on account of *Collet* and one *Anthony Butler*, on goods, warranted *American*, on board the ſame ſhip, "At and from *Madeira* to her laſt port of diſ-"charge in *India*, with liberty to touch, ſtay, and trade at "all ports, places, and iſlands, as well at the *Cape of Good* "*Hope*, as on this and the other ſide of it."—In an action on all theſe three policies, the plaintiff declared as for a total loſs on each, 1ſt, by ſeizure and detention by the King's officers; and 2dly, by the perils of the ſea.—The count upon the third policy ſtated the goods to have been ſhipped at *Madeira* on the 1ſt of *June* 1796.—Upon the trial of this cauſe, the jury found a ſpecial verdict, which ſtated in ſubſtance,—"That the ſhip was the joint property of *Collet* and *Butler*; that *Collet* on the 25th of *July* 1795, ſailed in the ſhip as maſter, from *Philadelphia*, with a cargo of corn and flour, for *France, with a view of proceeding from thence, with the ſhip, after the diſpoſal of her cargo, to* Madeira *and the* Eaſt Indies, *and from thence back to the* United States: That before the ſhip's departure from *Philadelphia*, *Butler* wrote to *Collet*, and, by way of aſſiſting him to form a right judgment how to act, propoſed three plans as probable to be accompliſhed. *Firſt*, after his arrival in *France*, to get a freight to the *Iſle of France*, to go from thence to *Bombay*, and to employ the ſhip in the country commerce between *India* and *China*, until ſhe had gained ſufficient to make a complete inveſtment in *China* for *America*. *Secondly*, to go from *France* to *London*, and there get a freight for the company's ſettlements in *India*, and then to purſue the ſame courſe of trade, or to take a freight direct from *Bengal* for *America*, for *Hamburgh*, or other neutral ports. *Thirdly*, to gain a credit in *London*, and go out to *Bombay* or *Bengal*, with a complete inveſtment on their own account, to obtain a freight to *China*,

remainder of her cargo, conſiſting of *Engliſh* and *Portugueſe* productions, and proceeds on her voyage to the *Britiſh* ſettlements in *India*, without any licenſe for the ſhip or the captain.—This is a legal voyage, and the inſurance on it valid; though the trade was not direct between *America* and *India*, and though, as far as related to the *Britiſh* goods, this was a trading from *Great Britain* to *India*, without a licenſe, and though C. was ſtill a *Britiſh* ſubject.

Wilſon v. *Marryat*, 8 T. R. 31.

China, and at length to bring a cargo from thence, of *Bengal*, back to *America* or *France*: That *Collet* arrived with the ſhip at *Breſt*, and there ſold the flour, then proceeded to *Bourdeaux*, where he ſold the reſt of the cargo, and there purchaſed the goods mentioned in the ſecond policy, and loaded them on his own account on board the ſhip, which, with the cargo, were there in ſafety on the 1ſt of *May* 1796.—That whilſt the ſhip was at *Bourdeaux*, *Collet* came to *London*, and having obtained a credit with *Wilſon* (the plaintiff,) who, with his money, or upon his credit, purchaſed, on account of *Collet* and *Butler*, *Britiſh* goods, being the goods mentioned in the third policy; and which were ſhipped at *London*, on the account and riſk of *Collet* and *Butler*, on board three *American* ſhips, and conveyed to *Madeira*, for the purpoſe of being there put on board the *Argonaut*, and of being carried therein, together with the goods ſhipped at *Bourdeaux*, from *Madeira* to the *Britiſh* territories in the *Eaſt Indies*, and there traded with. That the *Argonaut* ſailed to *Madeira*, where ſhe took thoſe goods on board, together with ſome *Portugueſe* wines, *for the purpoſe of proceeding with her whole cargo to the* Britiſh *territories in the Eaſt Indies*, and of trading with them there; neither *Collet* or the ſhip being licenſed by the *Eaſt India* company to ſail or trade there. That the ſhip having ſailed from *Madeira* for the *Eaſt Indies*, was, with her cargo, on the 2d of *Auguſt* 1796, at *Symon's Bay*, near the *Cape of Good Hope*, ſeized and detained by the *Engliſh* Admiral, on ſuſpicion of being an illicit trader. That both *Butler* and *Collet* were natural born *Britiſh* ſubjects, and both become citizens of the *United States*, and domiciled there; the former before, the latter after, the declaration of independence. That on the 16th of *February* 1793, the uſual proclamation at the beginning of every war was publiſhed here, forbidding all mariners, &c. natural born ſubjects of this country, entering or continuing in the ſervice of foreign ſtates, or ſerving in any foreign veſſel, without the King's licenſe; and that *Collet* had not obtained any ſuch licenſe: That the plaintiff, who was a *Britiſh* ſubject,

ſubject, reſident at *London*, knew that the *Argonaut* was deſtined for the *Britiſh* territories in the *Eaſt Indies*, and that the goods were intended to be carried thither for the purpoſes of trade therein."—Upon this caſe, it was objected, on the part of the defendant, 1. That, under the 13th article of the treaty, the *circuitous commerce*, which was the ſubject of the inſurances, was not permiſſible, that article only allowing of a *direct intercourſe* between the *United States* and the *Britiſh* ſettlements in *India*; which was plainly indicated by the word *between*. 2. That, by the 14th article, the trade between *America* and the King's dominions in *Europe*, is to be ſubject to the laws of the reſpective countries; and by the prior exiſting laws of *Great Britain*, all perſons, as well foreigners as natives, excepting the *Eaſt India* company, are prohibited from trading from *Great Britain* to the *Eaſt Indies*; and that as the *Argonaut* was to take in goods at *Madeira*, ſent from *Great Britain*, to be carried to the *Britiſh* ſetſettlements in *India*, this was, in effect, a trading from *Great Britain* to the *Eaſt Indies*, to which the *American* treaty only afforded a fraudulent colour. 3. That, admitting ſuch a circuitous voyage from *America* to *India*, by the way of *Europe*, to be warranted by the treaty, ſtill this voyage, undertaken with that view, being commenced before the ratifications of the treaty were exchanged (*a*), was illegal; and no part of an illegal voyage can be inſured: But, if it ſhould be conſidered only as a voyage from *Bourdeaux*, and ſo commencing after the ratification of the treaty, then it would not be within the 13th article, as not being a trading between *America* and the *Eaſt Indies*, in any ſenſe. 4. That, as *Collet* was born under the King's allegiance, and not being a citizen of the *United States* at the time of the declaration of their independence, he could only be conſidered as a *Britiſh* ſubject; and as ſuch, incapacitated by the navigation act, ſtat. 12 *C.* II. c. 18, from being maſter

(*a*) This, by the 28th article, was the period of its commencement.

of

of an *American* veſſel, and prohibited by the acts for regulating the trade to the *Eaſt Indies* from trading thither, except under the orders, or by the licenſe of the *Eaſt India* company.—But the court, upon great conſideration, overruled all theſe objections, and determined that the plaintiff was entitled to recover.—Lord *Kenyon*, in delivering their opinion, ſaid,—"Three objections have been raiſed on the part of the defendant. I will diſpoſe of that firſt which was laſt in argument, namely, That *Collet*, the captain and part-owner of the ſhip, was an *Engliſhman* by birth, and was not, therefore, a citizen of *America*, within the meaning of the treaty between this country and *America*. On a former day we intimated our opinion that there was not much weight in this objection; and after conſideration, we are clearly of opinion that there is none. *Collet* is a citizen of this country by birth, ſo that he cannot throw off his allegiance to it: He is alſo a citizen of *America*, for the purpoſes of commerce, having been adopted as a citizen of that country; and his being a natural born ſubject here, cannot deprive him of the advantages of being a citizen of that country. The next objection ariſes on the conſtruction of the 13th article of the treaty (*a*). It was contended, that on the true meaning of that article, the intercourſe between *America* and the *Eaſt Indies* muſt be immediate and direct: But, on the fulleſt conſideration that we can give this caſe, comparing this with the other articles of the treaty, we are alſo of opinion that this objection is unfounded. That the party inſured might have come from *America* to other countries in *Europe*, might have bought goods, carried them back to *America*, and from thence to the *Eaſt Indies*, ſeemed to be admitted. Then, in point of reaſon, why may not that which may be done indirectly, be done directly (*b*), and on the fair conſtruction of the words of

A natural born ſubject of *Great Britain* may become a citizen of the *United States* of *America* for the purpoſes of commerce, and ſhall be entitled to all the advantages of an *American* under this treaty; and his coming to this country for a temporary purpoſe does not deprive him of thoſe advantages.

(*a*) This objection was the firſt made.—(*b*) Perhaps, in anſwer to this queſtion, it might be ſuppoſed that the *Britiſh* government, knowing the diſadvantage with which the Americans muſt carry European commodities directly from *America* to *India*,

of this article, we think that this objection cannot prevail. The remaining objection is, that the voyage inſured was a part of a voyage, the whole of which, ſuppoſing it to be one integral voyage, was not legal in its inception; and that, if there be any infirmity in any part of an integral voyage, the whole, for this purpoſe, becomes illegal (*a*). But this argument is too refined, as applied to this caſe. Before the commencement of this voyage, there was a rumour, that a treaty between the two countries was in agitation, and this perſon came to *England*, probably with a view of carrying on the voyage to the *Eaſt Indies* under the treaty. However, in deciding this caſe, we muſt look to the facts diſcloſed in the ſpecial verdict. Now it is not there ſtated, that the continuation of the voyage to the *Britiſh* ſettlements in the *Eaſt Indies*, was the voyage that was at all events to be performed, when the voyage began in *America*. For though different plans had been ſuggeſted by *Butler*, in his letter, for the continuation of the voyage, it is only found by the ſpecial verdict, that *Collet*, when he ſailed from *America*, intended to go to the *Eaſt Indies*, but without ſaying to that part which belongs to *Great Britain*. As far as reſpected the *Americans*, every other part was *mare liberum*; and though before the treaty, the inſured could not have gone to any of our ports in the *Eaſt Indies*, without being guilty of an infraction of our law, he might have gone to any other port in the *Eaſt Indies*. Every thing, therefore, in the verdict relating to theſe different plans, though a fair ſubject of inveſtigation and diſcuſſion, may now be laid out of our conſideration; it not being found, in any part of the ſpecial verdict, what preciſe voyage the parties had in contem-

If an *integral* voyage be, in any reſpect, illegal in its commencement, no inſurance can be legally effected on any part of it, though ſuch part, taken by itſelf, would be legal.

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dia, meant that the trade between them and the *Britiſh* ſettlements in *India* ſhould be *immediate and direct*, leſt the Americans, by taking *Europe* in their way to *India*, might too eaſily rival the company in the *Indian* markets.—(*a*) This was the third objection made on the part of the defendant.

plation at the inception of the voyage from *America*. Then if the voyage inſured be not infected by what was done in *America*, it was a legal voyage. The ſhip originally ſailed from *Philadelphia* to *Breſt*, and then to *Bourdeaux*, which ſhe might legally do; and, before ſhe left the latter place, the treaty between this country and *America* was ratified. It then appears, that in *May* 1796, ſhe ſailed to *Madeira*, where ſhe took in other goods, "for "the purpoſe of proceeding with the whole cargo to the "*Britiſh* territories in the *Eaſt Indies*," which *then* ſhe might well do, under the treaty which had before that time been ratified. Then it does not appear that *Collet* had any intention of going to any of our ſettlements in the *Eaſt Indies*, until after the ratification of the treaty; and, though I admit, that if there had been any infirmity in any part of the integral voyage, it would have made the whole illegal, ſo that the inſured could not recover upon a policy on any part of it; yet it not appearing that in fact, there was any illegality in any part of this voyage, we are of opinion that this objection alſo fails."—This judgment was afterwards affirmed upon a writ of error in the *Exchequer chamber*, on which occaſion the opinion of the court was delivered by Lord C. J. *Eyre* on all the points of the caſe, in a very able and elaborate judgment (*a*).

(*a*) 1 *Boſ.* & *Pul.* 430.

CHAP. VI.

Of the Riſks or Perils againſt which marine inſurances may be made.

THE *perils of the ſea*, taken in the largeſt ſenſe, comprehend all thoſe accidents and misfortunes to which ſhips and goods at ſea are expoſed, from cauſes which no human prudence in the inſured can prevent or control; *quod fato contingit, et cuivis, quamvis diligentiſſimo, poſſit contingere.*

Though theſe perils are all incident to ſea voyages, yet we diſtinguiſh thoſe which ariſe from waves and tempeſts, rocks and ſands, and which are ſtrictly ſpeaking, the *perils of the ſea*, from ſuch as proceed from cauſes which may exiſt when the winds and waves are all propitious; ſuch as enemies, fire, the unſkilfulneſs or wilful miſconduct of the maſter or mariners, &c.

It is not propoſed, in the preſent chapter, to ſhew the nature and properties of each particular ſpecies of riſk, nor to which of them a loſs ſhall be referable, becauſe this will more properly occur when we come to treat of the loſſes themſelves. For the preſent, we will confine ourſelves to ſhew,

1. Againſt what riſks an inſurance may be legally made;
2. What riſks are within the common policies;
3. What are excluded by the uſual memorandum;
4. To what riſks the owners and maſter of the ſhip are liable;
5. What ſhall be the commencement, continuance, and end of the riſk;
6. Whether the riſk may be changed.

Sect. 1.

Againſt what Riſks marine inſurances may be legally made.

INSURANCES may be made againſt all the riſks or perils which are incident to ſea voyages, ſubject, however,

Inſurances may be made againſt all marine riſks,

ſubject to certain exceptions.

ever, to certain exceptions, founded in public policy, and the intereſts of humanity, which require that in certain caſes, men ſhall not be permitted to protect themſelves againſt ſome particular perils by inſurance.

But an inſurer cannot make himſelf anſwerable for a loſs proceeding from the fault of the inſured.

Upon principles of natural juſtice, the inſurer can, in no caſe, make himſelf anſwerable for any loſs or damage *proceeding directly from the fault of the inſured*; becauſe no man can bind himſelf to me to be anſwerable for my faults (*a*).

No inſurance can be made, even againſt the perils of the ſea, upon illegal commerce.

In the third chapter of this book, which treats of the ſubject matter of marine inſurances, we have already ſhewn that inſurances upon any traffic intended to be carried on contrary to the laws of this kingdom, or thoſe of its dependencies, or the law of nations, are void; and that the adventurer in ſuch traffic cannot be protected by inſurance, even againſt the ordinary perils of the ſea, much leſs againſt thoſe of ſeizure and confiſcation, which are always attendant upon ſuch illicit commerce, when detected.

The inſurance of the lives of men prohibited in *France*.

In moſt foreign countries, inſurances on the lives of men are prohibited.—In *France* they have always been deemed illegal (*b*), and are expreſsly forbidden by the ordinance of *Louis* XIV. (*c*); becauſe, ſay the *French* writers, it is an offence againſt public decency, to ſet a price upon the life of man, particularly the life of a freeman, which is above all valuation (*d*). 'But theſe reaſons,' ſays *Pothier* (*e*), 'do not apply to *ſlaves*.—*Negroes*, 'being an article of commerce, and capable of valuation, 'there is no reaſon why the lives of ſuch perſons ſhould 'not be the ſubject of inſurance.'

But the *French* writers hold that this does not apply to negro ſlaves.

This doctrine is evidently contrary to the expreſs proviſions of the 10th article of the ordinance above cited. It is curious, however, to obſerve by what ſort of reaſoning *Valin* attempts to vindicate it.—'It being permitted,' ſays he, 'by the 11th article of the ſame ordinance, to

(*a*) Vid. *Pothier*, h. t. n. 65.—(*b*) Le *Guidon*, ch. 16, art. 5.—(*c*) Tit. des aſſurances, art. 10.—(*d*) *Valin*, h. t. art. 10, p. 54. *Pothier*, h. t. n. 27.—(*e*) Ubi ſup.

'inſure

'insure the persons of captives redeemed out of slavery, 'to the amount of their ransom against recapture, or any 'death except natural death; upon their return to their 'native country, it has become a practice, by the ap- 'plication of this article to a *similar case*, to insure *negro* 'captives, *bought* on the coast of *Guinea*, who are gene- 'rally valued in the policy at so much per head; and in 'such case, the insurer becomes liable for their loss by 'the perils of the sea, or by death; but the case of *natural* 'death is always excepted, conformably to the last men- 'tioned article. By *natural death* is understood, not only 'that which arises from sickness, and common diseases, 'but that also which the slaves themselves often seek in 'the moment of despair; because these are accidents hap- 'pening *in the course of nature*, or occasioned by the *inherent* 'vice of the article, or sometimes by the fault of the mas- 'ter, which, therefore, ought not to fall on the insurers. 'But it is otherwise, when they are killed or thrown 'overboard in a revolt; for then, by the *French* law, the 'insurer is liable (*a*).

So that, according to this learned author, the disposition to suicide is natural, in negro slaves, and imputable to the *inherent vice of the article*, and their death proceeding from this cause must be deemed natural death. But the killing them, or throwing them overboard in a revolt, is a loss incident to this trade, and a peril within the policy.

In England, slaves were formerly insured against all risks.

It is to be lamented, that with us also, the unfortunate objects of this cruel traffic have been too much considered as mere merchandize; and the insured upon this trade formerly recovered, under the common policy, for any loss sustained in the voyage by the mortality of the slaves, whether they were thrown over-board, in cases of supposed necessity, or died a natural death, or perished by the perils of the sea. *British* humanity has long bewailed the sufferings of these unhappy victims. The legislature,

(*a*) *Valin*, h. t. art. 11. p. 55.

But now, by ſtatute, though the policy remains in the ſame form as before, it cannot protect the inſured againſt loſſes occaſioned by natural death, ill treatment, throwing overboard, or by reſtraint of princes occaſioned by attempts to get ſlaves by force.

touched by this ſenſation, has interpoſed, and by an annual act, which is made with a view to *intereſt* the perſons concerned in this trade in the preſervation of the lives and health of the ſlaves, declares, that though the policies on the ſhips and goods in this trade ſhall remain in the uſual form, yet that, 'Under ſuch policies, 'no loſs or damage ſhall be recoverable on account of the 'mortality of ſlaves by natural death or ill treatment, or by 'throwing them over-board on any account whatſoever (*a*), 'or by loſs or damage by reſtraints or detainments of 'kings, princes, people, or inhabitants of *Africa*, where 'it ſhall be made appear that ſuch loſs or damage was 'occaſioned through any aggreſſion, for the purpoſe of 'procuring ſlaves, and committed by the maſter of ſuch 'ſhip, or by any perſon commanding any boat, or party 'of men, belonging to ſuch ſhip, or by any perſon 'acting by the direction of any ſuch maſter or commander 'reſpectively (*b*)'.

Upon the conſtruction of theſe ſtatutes, it has been determined, that if, by unavoidable accidents, the voyage be prolonged beyond the uſual time, whereby a ſcarcity of proviſions enſues, and a number of ſlaves periſh for want of proper food; they ſhall be conſidered as having died a natural death; though the *original cauſe* of this misfortune may be ſaid to have ariſen from the perils of the ſea.

As where an *African* ſlave ſhip, on her paſſage to the *Weſt Indies*, was ſo retarded by bad weather and other unavoidable accidents, that, from the extraordinary length of the voyage, the proviſions for the ſlaves were exhauſted, and many of them died from the want of proper food.—Though the failure of the

Thus:—An inſurance was made on a ſhip and goods, "At and from *Liverpool* to the coaſt of *Africa*, "during her ſtay and trade there, and from thence to "her port and ports of diſcharge, ſale, and final deſti-"nation in the *Weſt Indies* and *America*, &c."—In the voyage from *Africa* to the *Weſt Indies*, the cargo conſiſted chiefly of ſlaves.—In an action on the policy, the plaintiff declared, "That the ſhip, with her cargo, after her departure from the coaſt of *Africa*, upon the voyage in-

(*a*) Vid. *Greg ſon* v. *Gilbert*, *Park*, 62. inf. c. 16. §2.—(*b*) Vid. Stat. 30 *G.* III. c. 33, § 8. 34 *G.* III. c. 80. § 10, and 39 *G.* III. c. 80. § 24.

ſured,

ſured, and before her arrival at any of her ports of deſtination, was, by tempeſtuous weather, and through the mere perils and dangers of the ſea, greatly retarded and delayed in her voyage; by reaſon whereof, and from a failure and want of proper and ſufficient food and ſuſtenance for the ſlaves, occaſioned by the ſhip being ſo delayed, divers of the ſaid ſlaves became diſtempered and died; and that afterwards the ſhip was loſt with the reſidue of the ſlaves and the reſt of the cargo."—Upon the trial of this cauſe, it appeared in evidence, that the voyage was from the river *Cameroon*, on the coaſt of *Africa*, to *Grenada*; that while the ſhip was at *Bilbay*, on the coaſt, there was a ground ſwell, by reaſon of which ſhe ſtruck ſeveral times, and was nearly wrecked; that from thenceforth ſhe became leaky, her rudder was rendered almoſt uſeleſs, and the veſſel unmanageable; that the cargo of ſlaves was reduced in the courſe of the voyage from 168 to 40, by hardſhips occaſioned by the delay of the voyage; by reaſon of which the ſlaves were obliged to be fed on *Indian* corn, which was an improper food for them; that all poſſible care had been taken to furniſh the ſhip, as well with *European* proviſions, as with ſuch as the coaſt furniſhed, for the uſe of the ſlaves; but that, inſtead of the ordinary voyage, which is from ſix to nine weeks, they did not arrive at *Barbadoes* till after a voyage of ſix months and eight days; and that the captain put into *Barbadoes*, inſtead of *Grenada*, which would have been a ſail of thirty-ſix hours longer, by the advice of the officers and crew, for the preſervation of the ſurviving ſlaves.—Mr. Juſtice *Heath*, before whom this cauſe was tried at *Lancaſter*, was of opinion, that the plaintiff was barred by the ſtatutes 30 *G.* III. c. 33. § 8. and 34 *G.* III. c. 80. § 10 (*a*), from recovering the value of the ſlaves, they having died natural deaths; but he reſerved that point for the conſideration of the court.—Upon the queſtion being moved in the court of King's Bench, it was urged on the part

proviſions was occaſioned by the perils of the ſea, and the death of the ſlaves was a conſequence of this; yet the ſlaves ſhall be conſidered as having died a natural death within the meaning of the 30 *G.* III. c. 33, § 8. and 34 *G.* III. c. 80. § 10.

Tatham v. *Hodgſon*, 6 T. R. 656.

(*a*) Sup. 133, 134.

of the plaintiff, that the misfortune had been occaſioned by the extraordinary and incalculable duration of the voyage, ariſing from the perils of the ſea; in conſequence of which the ſlaves had been actually *ſtarved* to death, which could in no ſenſe be conſidered as a *natural* death; nor would the plaintiff's recovery contravene the humane intention of the legiſlature, which was directed againſt inſurances to protect the owners from loſſes ariſing from their own negligence and miſconduct.—But the court concurred in opinion with Mr. Juſtice *Heath*, and determined that the above ſtatutes precluded the plaintiff in this caſe from recovering for the loſs of the ſlaves.—Lord *Kenyon* ſaid,—"No fair doubt can be raiſed on the words of the act. It prohibits the owners from recovering upon any inſurance, on account of the mortality of ſlaves by natural death. It meant that every perſon going on this voyage, ſhould find his intereſt combined with his duty, to take all poſſible care that the ſlaves ſhould be well fed. A captain, who knows the poſſible length of the voyage, does not diſcharge his duty, if he does not take a ſufficient quantity of proviſions."—Mr. Juſtice *Lawrence* ſaid,—"I do not know that it was ever decided, that a loſs ariſing from the miſtake of the captain, was to be deemed a loſs by the perils of the ſeas. In the caſe of *Gregſon* v. *Gilbert* (*a*), where the captain miſtook *Jamaica* for *St. Domingo*, it was decided not to be a loſs by the perils of the ſea. In this caſe, it is impoſſible to decide that the plaintiff can recover, without ſaying that the ſlaves did not die natural deaths. If they had died of fevers or other illneſs occaſioned by the length of the voyage, the plaintiff certainly could not have recovered. Now the length of the voyage, occaſioned the want of proviſions, and that occaſioned the illneſs of which they died: But that is a natural death within the meaning of the act of parliament."

(*a*) Inf. c. 16. § 2.

What

Sect. 2.

What Risks or Perils are within the common Policies.

THE words of an *English* policy, which specify the various risks against which insurances are usually made, are these:—'Touching the adventures and perils which 'we the assurers are contented to bear, and do take upon 'us in this voyage, they are of the seas, men of war, 'fire, enemies, pirates, rovers, thieves, jettisons, letters 'of mart and counter-mart, surprizals, takings at sea, 'arrests, restraints and detainments of all kings, princes, 'and people, of what nation, condition, or quality so-'ever; barratry of the master and mariners; and of all 'other perils, losses, and misfortunes, that have or shall 'come to the hurt, detriment, or damage of the said 'goods and merchandizes, and ship, &c. or any part 'thereof, without prejudice to this insurance.' The words of the policy which specify the risks.

Some foreign authors think that, under words nearly similar, the insurer is not liable for losses arising from unusual or extraordinary accidents (*a*). But the sweeping words, in the latter part of the above clause, seem to preclude all doubt on this subject, in our *English* policies. They seem to be sufficiently comprehensive to embrace every species of risk to which ships and goods are exposed from the perils of sea voyages.

Molloy, (*b*) indeed, says, 'Almost all those curious 'questions that former ages and the civilians, according 'to the marine law, nay, and the common lawyers too, 'have controverted, are now out of debate. Scarce any 'misfortune that can happen, or provision to be made, 'but the same is provided for in the policies that are now 'used; for they insure against heaven and earth, stress of 'weather, storms, enemies, pirates, rovers, &c. or what-

(*a*) *Roccus* not. 63, *Santerna* part. 3, n. 78, *Pothier, des obligations*, n. 668.—(*b*) B. 2. ch. 7. § 7.

'ever

'ever detriment ſhall happen or come to the thing in-'ſured (*a*).

In all the *French* policies they add the words, '*connus ou inconnus*', or others of the like import; and the inſurer, by expreſs words, puts himſelf in the place of the inſured (*b*).

Sect. 3.

What Riſks are excluded by the common Memorandum.

BUT, by the agreement of the parties, the general words of the policy may be altered or qualified, and any of the riſks may be wholly or in part excluded and the inſurance may be made only againſt ſome particular riſks, or up to, or beyond, certain degrees, or upon particular articles.

In all policies it is ſtipulated that the inſurer ſhall not be liable for any partial loſs, on certain articles, nor above certain rates on others.

In order to confine inſurances to that which ought to be their only object, namely, an indemnity againſt real and important loſſes, ariſing from the perils of the ſea; and to obviate diſputes reſpecting loſſes ariſing from the periſhable quality of the goods inſured, and all trivial ſubjects of difference and litigation, it ſeems to be the general law of all maritime ſtates, and it is expreſsly provided by the ordinance of *Louis* XIV., that the inſurer ſhall not be liable for any average loſs, unleſs it exceed *one per cent* (*c*). Beſide this, a clauſe has been introduced into the policies of moſt countries, by which it is ſtipulated that the inſurer ſhall not be liable for any partial loſs under a given rate *per cent.*—In *England*, it is now conſtantly ſtipulated in all policies, that upon

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(*a*) Sub nomine periculi, de quo fit cautio comprehenditur omnis caſus qui accidit in mari, a tempeſtate, ab hoſtibus, prædonibus, repriſaliis, ut vocant arreſtis aliiſque modis uſitatis et inuſitatis citra fraudem et culpam contrahenſium, aut domini mercium vel navis. *Grot.* de jur. Hol. part. 24.—(*b*) Vid. *Emerig.* vol. 1. p. 361.—(*c*) Vid. *Valin*, on art. 47. h. t. p. 113.

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certain enumerated articles of a quality peculiarly perishable, the insurer shall not be answerable for any partial loss whatever; that, upon certain others, liable to partial injuries, but less difficult to be preserved at sea, he shall only be liable for partial losses above *five per cent*; and that, as to all other goods, and also the ship and freight, he shall only be liable for partial losses above *three per cent*.

This clause was first introduced in 1749, to save the necessity of adapting the premium to the nature of the commodity.

This stipulation is made by a memorandum in the form of a warranty, inserted at the bottom of all *English* policies. It was first introduced here about the year 1749; before which time the insurer was liable for every injury, however small, that happened to the thing insured. It was therefore thought better, by such a stipulation, to free him from small partial losses, than to compensate him for the extraordinary risk, by adapting the premium to the nature of the commodity. This must, in such cases, either have rendered the calculation of the premium a matter of much nicety, or else have made the policy too complicated; a mode of insurance which was the less likely to be adopted here, as the *Dutch* had before tried it, and were afterwards obliged to abandon it (*a*).

But the insurer is liable for losses, however small, called *general average*, and losses occasioned by the *stranding of the ship*.

But though all our different policies thus provide against trivial demands on account of small partial losses, yet they all indemnify the insured against every loss, however inconsiderable, arising from any cause affecting the general safety of the ship and cargo. Losses of this sort, being of the nature of *general average*, are so called in the memorandum; and there is, therefore, annexed to each of the provisions above mentioned, an exception of general average. In the policies of private insurers, the case of the *stranding of the ship* is likewise excepted.

The form of this memorandum.

In the common policies, used in *London* by private underwriters, the memorandum runs thus:

In the policies of private underwriters.

'N. B. Corn (*b*), fish, salt (*c*), fruit, flour and seed,

(*a*) 3 *Bur.* 1551.—(*b*) The term *corn* comprehends every sort of grain, and also pease and beans. Vid. *Mason* v. *Skurray*, inf. 143.—(*c*) The term *salt* does not comprehend *salt petre*. Per *Wilson* J. at N. P. after East. 27 *G.* III. in *Journu* v. *Bourdieu*, *Park.* 112.

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'are warranted free from average, unleſs general, or 'the ſhip be ſtranded:—Sugar, tobacco, hemp, flax, 'hides and ſkins, are warranted free from average, under '*five per cent.*; and all other goods, alſo the ſhip and 'freight, are warranted free from average, under *three* 'per cent. unleſs general, or the ſhip be ſtranded (*a*)'.

But, it being determined, that any ſtranding lets in the inſured to claim his whole partial loſs, the two inſurance companies omitted the words "*or the "ſhip be ſtranded.*"

This form of the memorandum was generally uſed, not only by private underwriters, but alſo by the two inſurance companies, from its firſt introduction in 1749, till the year 1754, when a caſe occurred on a policy on *corn*, where the ſhip being *ſtranded*, the inſured recovered a partial loſs to the amount of about 80 l. *per cent.*—Lord C. J. *Ryder*, and a ſpecial jury, conſidering the words, '*free from average, unleſs general, or the ſhip be ſtranded*', as a *condition*, and holding that by the ſhip's being ſtranded, the inſured was let in to prove his whole partial loſs (*b*).

Camillon v. *Lond. Aſſur.* at N. P. in 1754, cited 3 *Bur.* 1553.

In conſequence of this determination, the *London Aſſurance* company left out of the memorandum in their policies, the words '*or the ſhip be ſtranded*;' and the *Royal Exchange Aſſurance* ſoon after adopted the ſame alteration. Private underwriters, however, have continued the memorandum in the old form, probably with a view to encourage merchants to inſure with them, in preference to the two inſurance companies; and it muſt be owned, that caſes may occur where the difference may be of conſiderable conſequence to the inſured.

(*a*) The only material difference between the memorandum of private underwriters, and thoſe of the two inſurance companies, conſiſts in the omiſſion of the words '*or the ſhip be ſtranded*,' and that they inſert *rum* among the articles upon which they will not be liable to any partial loſs under five *per cent*; and omit *freight* out of the articles upon which there ſhall be no partial loſs under three *per cent.*—Vid. the forms of the different policies in the ſchedule to the 35 G. III. c. 63. and in the Appendix, numbers 1 and 2.—(*b*) There is a note in 2 *Mag.* 385, in which this caſe is looſely mentioned, as affording a reaſon for ſtriking the words, "*or the ſhip be ſtranded*," out of all policies. But the caſe as cited by Sir *Fletcher Norton*, as above, is the only one to be relied on. Vid. 7 T. R. 222.

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Be that, however, as it may, much doubt has ariſen as to the true meaning of the words, '*free from average*, '*unleſs general, or the ſhip be ſtranded;*' and a different conſtruction having been put on this clauſe by judges of the higheſt eminence, the beſt mode, perhaps, of ſhewing how it is now underſtood, will be to ſtate the various deciſions upon it, ſubſequent to the above caſe of *Cantillon* v. *Lond. Aſſurance*, in the order of time in which they occured.

Many queſtions have ariſen on the words, "*free from average, unleſs general, or the ſhip be ſtranded.*"

In the firſt of theſe, which was determined in the year 1764, the only point decided by the court was, that the underwriters were, by the memorandum, exempted from any reſponſibility for a partial loſs, ſuſtained by a cargo of corn in a ſtorm; the ſhip not having been *ſtranded*, and this not being a *general average*.—But it will appear, that Lord *Mansfield*, in delivering the opinion of the court, over-rules the deciſion of Sir *Dudley Ryder* in *Cantillon* v. *London Aſſurance*, and founds his judgment on the ground, that the above words do not make a *condition*, but only an *exception*; and that the inſurer is liable only for partial loſſes upon corn, &c. *ariſing* from the ſhips being *ſtranded*, or of the nature of a *general average*; but to no other partial loſſes.

The word *unleſs* has been held to make an *exception*, not a *condition*.

The caſe alluded to, was an inſurance on a cargo of wheat, "At and from *Lancaſter* to *Rotterdam*."—The policy was in the ordinary form, and contained this clauſe;—"*Corn and fiſh are warranted free from average,* "*unleſs general, or the ſhip be ſtranded.*"—It appeared that the ſhip, in her voyage, met with a violent ſtorm, by which ſhe was obliged to part from her cable and anchor, *for the ſafety of the ſhip and cargo*, was greatly damaged, and obliged to run for the firſt port, being *Liverpool*, to refit, and where ſhe incurred a conſiderable expence in refitting. That the hatches were not opened while the ſhip remained at *Liverpool*. That the ſhip being refitted, ſhe proceeded on her voyage, and arrived at *Rotterdam*, where the wheat was landed, and appeared to have received damage by the ſtorm, to the amount of 56l. 19s. 8d. *per cent.*—The queſtion was, upon the above clauſe, whether this could be recovered againſt the inſurer.—For the plaintiff, it was contended, that the words of the memorandum amounted

A ſhip, with a cargo of corn, having met with a ſtorm, was obliged to run for the neareſt port to refit, where ſhe incurred a conſiderable expence in repairs. On her arrival at her port of deſtination, it was found that the corn was greatly damaged.—This loſs, not being of the nature of a *general average*, nor ariſing from the ſhip's being *ſtranded*, cannot be recovered on the policy; for the words of the memorandum do not make a

condition, but only an *exception*.

Wilſon v. *Smith*, 3 *Bur.* 1550.

amounted to a *condition* to be free from average, unleſs, in the caſe of a *general average*, or the ſtranding of the ſhip: But, if *either* of theſe events ſhould happen, this warranty was diſcharged; and as an authority for this, the cauſe of *Cantillon* v. *London Aſſurance* (*a*), was relied on.—On the other ſide, it was inſiſted, that theſe words only made an *exception*, to be free from average in all other caſes, but theſe two; and as neither of them had happened, in this inſtance, the inſured had no claim on the inſurer.—The court were of this opinion, and gave judgment for the defendant.—Lord *Mansfield*, in delivering the opinion of the court, ſaid "that an ambiguity aroſe in the policy, from its uſing the words *average* in different ſenſes; it being uſed to ſignify *a contribution to a general loſs*, and alſo a *particular partial loſs*; that, whether taken in the one ſenſe or the other, it would not avail the plaintiffs; for if it ſignified *contribution*, the inſurer was to be free from contributing, unleſs the contribution were *general*; if it ſignified *loſs*, then plainly the warranty was, that the inſurer ſhould be free from all *particular* loſſes. That the inſurer was liable for all loſſes *ariſing* from a ſtranding of the ſhip, and where there was a *general* average; but that all other *partial* loſſes were excluded by the terms of the policy. That the word *unleſs* meant the ſame as *except*; and was not to be conſtrued as a *condition*, in the ſenſe contended for (*b*); and that the words 'free from average, *unleſs general*,' could never mean to leave the inſurer liable to any *particular* average."

The next was a *niſi prius* caſe, before Lord *Mansfield*, in 1780, in which it was proved to be the uſage of trade, that where the ſpecific thing mentioned in the memorandum came to the port of delivery, the memorandum warranted the inſurer to be free from any demands in reſpect of any damage it might have ſuſtained, though amounting to a total loſs; and Lord *Mansfield* told the

(*a*) Sup. 140.—(*b*) Lord *Kenyon* in his judgment on the caſe of *Burnett* v. *Kenſington*, inf. conſiders this as an *obiter dictum*, which does not bring conviction to his mind.

jury, that this uſage muſt be conſidered as forming a part of the contract.

That was an inſurance made on a cargo of *peaſe (a)*, "from *London* to *St. Auguſtine*;"—The peaſe arrived at the port of deſtination, but ſo much damaged in the voyage, that they produced but about one fourth of the amount of the *freight*; which, as the ſhip arrived at her port of diſcharge, became due.—The inſured brought an action to recover as for a total loſs.—The defence was, that, if the goods mentioned in the memorandum, arrived *at the market*, though a loſs equivalent to a total loſs had happened, the inſurer is not liable.—Four or five witneſſes, converſant in ſettling loſſes upon policies, proved that the uſage was, in ſuch caſes, to hold the underwriter diſcharged.—Lord *Manſfield*, in his addreſs to the jury, ſaid,—'This is a queſtion of conſequence, and turns upon the general import of the exception. The witneſſes examined have put it on that point, and they hold, that if the ſpecific thing come to the port of delivery, the underwriter cannot be called upon. Before the year 1749 (*b*), when the policy was general, and operated as an indemnity, there was little difference between a total and a partial loſs.'—He then ſtated the caſe of *Boyfield* v. *Brown* (*c*), which, he obſerved, was prior to the memorandum in queſtion. He then ſaid,—'But the caſes now ſtand upon that memorandum, which is in very general words: The queſtion is, whether the uſage has not explained the generality of the words. If it has, every man, who contracts under an uſage, does it as if the point of uſage were inſerted in the contract *in terms*. The witneſſes all ſwear it to have been underſtood, that if the ſpecific thing come to the market, the memorandum warrants the inſurer to be free from any demand as for a partial loſs.'—The jury found for the defendant.

A cargo of *corn* arrives at the port of delivery ſo damaged in the voyage as to be worth leſs than the freight:—Yet the ſhip not having been *ſtranded*, and there being no *general average*, the inſurer is not liable.

Maſon v. *Skurray*, at N. P. after *Hil.* 1780. *Park* 116.

Though the caſe of *Boyfield* v. *Brown* was ſeveral years before, and this long after, the introduc-

(*a*) *Peaſe*, in a former action on the ſame policy, had been holden to be *corn*, within the meaning of the memorandum.—(*b*) Vid. Sup. 139.—(*c*) 2 Str. 1065, inf. c. 13, § 2.

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tion of the memorandum into policies of insurance, it is very difficult to reconcile them. Lord *Mansfield* seems inclined to *distinguish* them, by observing, that before the year 1749, when the policy was general, there was little difference between a total and a partial loss; but that, since then, the cases stood on the memorandum.—It is true, that where there is but little difference between a total and a partial loss, it is of little importance, how the question is decided: But Lord *Hardwicke* was too good a lawyer not be aware of the consequences likely to result from the precedent; and indeed it appears, that, in the case of *Boyfield* v. *Brown*, he founded his judgment on the usage of trade, as it was in evidence, namely, that where the salvage exceeds the freight, the freight is deducted from the salvage, and the difference is the loss. From this his Lordship very justly infers, that where the salvage falls short of the freight, the plaintiff is intitled to have it considered as a total loss.

The following case, which came before the court some years after the above case of *Mason* v. *Skurray*, was decided upon the same principle, or rather carried the principle farther.

If the articles for which the insurer is warranted to be free of average, except general, *specifically remain* after the voyage, though, by sea damage, they are rendered of no value, yet if the ship has not been stranded, this is only a *partial loss*, for which the insurer is not liable.

An insurance was made "on ship and goods, at and "from *Newfoundland* to her port of discharge in *Portu-* "*gal*."—It contained the usual memorandum, that corn, fish, &c. were warranted free from average unless general, or the ship be stranded.—The defendant paid into court 16 l. 19 s. 6 d., viz. 8 l. 15 s. *per cent.* as *general* average on the cargo, and 8 l. 4 s. 6 d. as a *particular* average on the ship.—There was a verdict for the plaintiff for 51 l. 15 s., subject to the opinion of the court, on a case, which stated,—That the ship sailed on the voyage insured on the 2d of *December* 1783, with a cargo of fish; that on the 11th, 40 quintals were hove over board, for the preservation of the ship and cargo; that on the 20th, 26 quintals more were thrown overboard, for the same purpose; that the ship had very bad weather till the 10th of *January*, when she was obliged to put into *Lisbon*, though bound to *Figara*; that at *Lisbon* she was surveyed by the board of health, at the desire of the captain,

Cocking v. *Fraser* B. R. East. 25 *G.* III. MS. There is a note of this case in *Park* 114.

tain, who was the conſignee; and it appeared to them that the cargo, through ſea damage, was rendered *of no value*; that the ſhip, therefore, did not proceed to *Figara*. —Upon this caſe, the court were of opinion, that the underwriter was anſwerable for no more than he had paid into court on account of general average on the cargo, and particular average on the ſhip.—Lord *Manſfield* ſaid, —"The clauſe relative to fruit and fiſh is now a very old one in policies of inſurance. The inſurer undertakes for all loſſes upon theſe articles, except particular damage, within a certain amount, unleſs the ſhip be ſtranded; he therefore engages againſt a total loſs. Now a total loſs of the thing inſured, is *the abſolute deſtruction of it, by the wreck of the ſhip*. The fiſh may all come to port, though, from the nature of the commodity, it may be damaged, it may be ſtinking: Still, as the commodity *ſpecifically* remains, the underwriter is diſcharged (*a*)."

The inſurer has never been held liable, but for a total loſs upon the enumerated articles.

—Mr. Juſtice *Buller* ſaid,—"That from the firſt introduction of the clauſe in 1749, to the preſent time, the underwriter has never been held anſwerable, but where there has been a *total loſs* of the articles mentioned in it."

If the ſhip be ſtranded, the inſured may recover for any partial loſs, though it do not *ariſe* from the ſtranding.

In the next caſe which occurred on this ſubject, Lord *Kenyon*, at *niſi prius*, held, that where the ſhip has been *ſtranded*, the articles mentioned in the memorandum are put in the ſame ſituation as any other commodity; and that the inſurers become liable for all damage which they may ſuſtain, though not *ariſing* from the ſtranding.

The memorandum controuls the general words of the policy, as far as it extends. But, upon a ſtranding taking place, the articles mentioned in the memorandum are put in the ſame ſituation as any other commodity; and the inſurers become liable for all damage ſuſtained by them, though not ariſ-

There, an inſurance was made on *fiſh* on board the ſhip *Nymph*, "from *Chaleur Bay* to her port or ports of diſcharge, in *England, Ireland, Portugal, Spain*, or *Italy*."—

(*a*) If a cargo of corn become *entirely rotten*, the inſured cannot abandon; this being only a ſimple average, which would not excuſe the inſured from paying the ſtipulated freight. *Pothier, Contrats maritimes*, n. 59. The reaſon is, that though the corn be damaged or ſpoiled, it ſtill exiſts. The damage does not operate an entire loſs, and the owner is not deprived of it. Vid. *Emerig.* vol. 2. p. 184. But ſee the obſervations of Lord *Kenyon* on this judgment of Lord *Manſfield*, in *Burnett* v. *Kenſington*, inf. 151.

ing from the ſtranding.

Bowring v. *Elmſlie*, at N. P. after Tr. 1790, cited 7 T. R. 216.

The policy contained the uſual memorandum.—An action was brought on the policy to recover a partial loſs ſuſtained by the fiſh, the ſhip having been, as the declaration ſtated, *ſtranded*; that is, ſhe was in ſuch a leaky condition, that the captain and crew thought it neceſſary to run her on ſhore off *Malaga*, for their own preſervation, thinking it would be impoſſible to get her into port.—On the part of the defendant, there was evidence to ſhew that there was no neceſſity for running the ſhip on ſhore, but that it had been done with a fraudulent intention; and it was contended, that even ſuppoſing the ſhip to have been unavoidably ſtranded, the greateſt part of the damage ſuſtained by the fiſh was occaſioned by its having been too long on board, and not by any defect in the ſhip, or her being ſtranded.—Lord *Kenyon*, after ſtating the evidence to the jury, told them, that if they ſhould think that the captain and crew acted *bonâ fide*, and that the ſhip was run on ſhore from neceſſity, a further queſtion would ariſe upon the conſtruction of the memorandum, which, like the policy itſelf, muſt be interpreted by the uſage of merchants. It being then ſignified to his Lordſhip, by the merchants in court, that there was no uſage upon the ſubject, and that the queſtion, never having before occurred, was then for his deciſion; he proceeded to obſerve, that the general mode of conſtruing deeds, to which there are exceptions, was, to let the exception control the inſtrument as far as the words of it extend, and no farther; and then, upon the caſe being taken out of the letter of the exception, the deed operates in full force. That, agreeably to this rule, it ſeemed to him that the ſtranding of the ſhip put fiſh in the ſame ſituation as any other commodity not mentioned in the memorandum; and the underwriters were liable for all damage ſuſtained by it; for otherwiſe there would be very conſiderable difficulty in aſcertaining how much of the loſs aroſe from the perils inſured againſt, and how much by the periſhable nature of the commodity, which was the very thing the memorandum was intended to prevent.—A verdict was given for the defendant,

ant, on the ground that the ſhip had been run on ſhore fraudulently.

The above opinion of Lord *Kenyon* is conformable to that of Sir *Dudley Ryder*, in the caſe of *Cantillon* v. *Lond. Aſſurance* (*a*). It does not however appear by the note of the caſe, that any of the deciſions ſubſequent to that caſe, were cited upon that occaſion. Indeed it would ſeem, from the manner in which Lord *Kenyon* delivered his opinion, that none of them had been mentioned; and as the defendant obtained a verdict upon another ground, the opinion delivered at the trial never became the ſubject of any further diſcuſſion.

This agrees with Lord C. J. *Ryder*'s doctrine in *Cantillon* v. *Lond. Aſſur.*

The next caſe came before the court of King's Bench in 1792, and in that it was determined, that if a mob of rioters board a ſhip, and oblige the captain to ſell a quantity of corn at an inferior price; the loſs upon this is not in nature of a general average.—But if, in conſequence of this boarding, the ſhip be ſtranded, and a quantity of corn be loſt; this is a loſs by *ſtranding* within the memorandum, for which the inſured may recover upon a count applicable to ſuch loſs.

An inſurance was made on a cargo conſiſting of *wheat* and coals, from *Youghall* to *Sligo*. The ſhip was forced, by ſtreſs of weather, into *Elly Harbour*, in *Ireland*, and there happening to be a great ſcarcity of corn at that time, the people came on board the ſhip in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which ſhe drove upon a reef of rocks, where ſhe was ſtranded, and they would not leave her till they obliged the captain to ſell all the corn, except about 10 tons, at a certain rate. The 10 tons were, however, ſpoiled, in conſequence of the ſtranding, and obliged to be thrown overboard. The ſhip afterwards arrived at *Sligo* with the coals, which were but a ſmall part of the cargo.—There were two counts in the declaration, one alledging the loſs to have been by the *detention of certain people*; the other by *pirates*;

A mob of rioters board a ſhip, and oblige the captain to ſell a quantity of corn at an inferior price; the loſs upon this, is not in nature of a general average.—If, in conſequence of this boarding, the ſhip be *ſtranded*, and a quantity of corn be thereby loſt: This is a loſs by ſtranding within the memorandum; but the owner cannot recover for it, but upon a count for a loſs by ſtranding.

Neſbit v. *Luſhington*, 4 T. R. 783.

(*a*) Sup. 140.

but no count for a loſs by *ſtranding*.—The inſured never abandoned; and, and as the cargo produced three fourths of its original value, there could be no total loſs: There was, however, a verdict for the plaintiff, as for a total loſs.—Upon a motion to ſet aſide this verdict, it was contended, on the part of the inſured, that as the captain was obliged to let the people take the corn, to induce them to ſpare the reſt of the cargo, this was a *general average*, and within the exception in the memorandum. But, even ſuppoſing this not to be a general average, yet, that the meaning of the memorandum muſt be confined to the ſort of damage which is naturally incident to the commodities there ſpecified, being of a periſhable nature, and liable to a peculiar ſpecies of deterioration, not common to other articles; and that a loſs by irreſiſtable force, to which any other goods were equally liable, could never be within the meaning of the memorandum, which was to prevent diſputes in theſe articles ſubject to heat and putrefaction.—But the court determined that the plaintiff could not recover in this action; becauſe the loſs upon the corn which was *ſold*, could not be imputed to the *ſtranding*; and, as to the 10 tons thrown overboard, though that was a loſs occaſioned by the ſtranding, yet the plaintiff could not recover for it, becauſe there was no count in the declaration applicable to ſuch a loſs —Lord *Kenyon* ſaid, "That if a partial loſs could have been recovered upon this policy, the plaintiff might have recovered for the loſs by *pirates*. But as this was a policy on *corn*, the underwriter was liable for no average, unleſs general, or the ſhip were ſtranded. That this was not a *general average*, becauſe the whole adventure was never in jeopardy: For the perſons who took the corn, intended no injury to the ſhip, or any other part of the cargo but the corn; and therefore the owners of the corn could never have called on the other owners to contribute, as upon a general average. That the meaning of the memorandum was, that as it might be difficult to aſcertain whether a damage to the articles enumerated in it aroſe from accident, or the nature of the articles themſelves, this memorandum was inſerted

The meaning of the memorandum is, that, in no caſe, the inſurer ſhall be liable for any

in all policies to prevent diſputes, by providing that the inſurer ſhould not pay any average on thoſe articles, unleſs general or the ſhip were ſtranded.—That when the ſhip is ſtranded, the underwriters agree to aſcribe the loſs to the ſtranding, as being the moſt probable occaſion of the damage, though that fact cannot always be aſcertained."—Mr. Juſtice *Buller* agreed, "that there could be no general average, for the reaſons already given. And, as to the ſtranding, he ſaid the inſured were entitled to recover, *for any loſs occaſioned by ſtranding, provided it were an immediate and direct conſequence of the ſtranding* (*a*); and therefore the loſs of that which was thrown overboard being aſcribable to the ſtranding, and being a direct and immediate conſequence of the peril inſured againſt, might have been recovered, had there been any count in the declaration, applicable to a loſs by ſtranding. But that the loſs upon the corn *taken by the rioters*, was not the conſequence of the ſtranding, but the rioters took poſſeſſion of the ſhip, in order to get at the corn; and this was the *cauſe*, and not the *conſequence* of the ſtranding."

partial loſs on the articles enumerated, unleſs it be a *general* average, or the ſhip be *ſtranded*; and he ſhall be liable for no other loſs, though it be of a nature to which any other commodity is equally liable. A loſs by ſtranding muſt be an immediate, not a remote conſequence of the ſtranding to be within the memorandum.

In the next caſe which occurs on this ſubject, Lord *Kenyon*, at *niſi prius*, adopts the principle of the caſes of *Maſon* v. *Skurray* (*b*), and *Cocking* v. *Fraſer* (*c*); namely, that, in the caſe of any of the articles enumerated in the memorandum, where the ſhip has not been ſtranded, the inſured cannot recover for any partial loſs, however great, which is not of the nature of a *general average*; and that, in ſuch caſe, he can only recover as for a *total loſs*; and then the voyage muſt either have been loſt, or the goods *wholly deſtroyed*.

If the ſhip be not ſtranded, the inſured cannot recover for any partial loſs however great, but only for a total loſs.

That was an inſurance on *fruit*, from *Liſbon* to *London*. It appeared that the ſhip was captured, recaptured, and

A cargo of fruit is captured and re-captured, and brought to the port of deſtination, but damaged 80 *per cent.* by the delay. In this caſe, as there has been neither a *ſtranding*, nor a total loſs by the capture, the inſurer is not liable, either to

(*a*) This doctrine is conformable to the ſentiments of Lord *Mansfield* in the caſes of *Wilſon* v. *Smith*, ſup. 141, and *Cocking* v. *Fraſer*, ſup. 144. But ſince the caſe of *Burnett* v. *Kenſington*, which will be cited preſently, that doctrine has been quite exploded.—(*b*) Sup. 143.—(*c*) Sup. 144.

a partial, or a total loſs.

† ——— *M'Andrews* v. *Vaughan*, at N. P. after Mich. 1793; *Park* 114.

brought into *Portſmouth*, from whence ſhe afterwards came to *London*: That the cargo, in conſequence of the length of the voyage, occaſioned by the capture, had ſuſtained damage to the amount of 80 *per cent*: That the inſured never heard of the capture, till the ſhip was ſafe at *Portſmouth*; and then offered to abandon.—Lord *Kenyon*, who tried the cauſe, ſaid,—"As there has been no *ſtranding*, there cannot be a recovery for a partial loſs. The queſtion then is, whether the inſured can recover as for a *total* loſs. Had the plaintiff *heard* of the capture only, he might have abandoned: But he hears nothing of the accident, till the ſhip is in ſafety. The cargo arrives at the port of deſtination; and though it is good for very little; yet it has invariably been held, that the voyage muſt either have been loſt, or the cargo, (if it be one of the articles mentioned in the memorandum), muſt be wholly and actually deſtroyed, to entitle the inſured to recover,"—The plaintiff was nonſuited.

To recover in ſuch caſe as for a total loſs, the voyage muſt either have been loſt, or the goods wholly deſtroyed.

It may not be improper here to obſerve, that the concluding words of the learned judge, taken in an unqualified ſenſe, might miſlead perſons not familiar with the law of inſurance. Under the memorandum, the inſured would be intitled to recover for *any partial loſs*, however ſmall, of the nature of a *general average*; for inſtance, he might recover his proportion of the ſalvage to the recaptors; his Lordſhip's words muſt therefore be underſtood, as he intended them, to relate only to the caſe before him, where the queſtion was, whether the inſured could recover for the particular damage done to his fruit, in conſequence of the *length of the voyage*, occaſioned by the capture, which was a partial loſs, not of the nature of general average.

It is now ſettled, that if the ſhip be ſtranded, the inſurer is liable for any partial loſs in any of the articles in the memorandum, though ſuch loſs did not ariſe from

Thus far has remained undetermined, the important queſtion upon the conſtruction of the memorandum, whether the words, '*or the ſhip be ſtranded*,' make a *condition*, ſo as, upon a ſhip's being ſtranded, to let in the inſured to prove his whole partial loſs upon any of the articles,

articles in the memorandum, from whatever cauſe ſuch loſs might have ariſen, as it was originally held by Sir *Dudley Ryder* (*a*); and afterwards by Lord *Kenyon* (*b*); —Or whether thoſe words amount only to an *exception*; ſo that the inſurer ſhall be liable to partial loſſes ariſing from the ſtranding only; according to the opinion of Lord *Mansfield* (*c*), and of Mr. Juſtice *Buller* (*d*).—But at length, in the following caſe, which is the laſt that has occurred on the conſtruction of the memorandum, this queſtion came directly before the court of King's Bench; and it was there, after ſolemn argument, and upon great conſideration, determined, that a ſtranding deſtroys the exception in the memorandum, and lets in the general words of the policy; and that, therefore, where the ſhip has been ſtranded, the inſurer is liable for any partial loſs ſuſtained by any of the articles mentioned in the memorandum, though ſuch loſs did not ariſe from the ſtranding, but ſolely from another cauſe.

the ſtranding, but from ſome other cauſe.

In that caſe an inſurance was made on *fruit* on board the *Commerce*, "At and from *Malaga* and *Velez Malaga* "to *Plymouth* and *Portſmouth*."—An action was brought on this policy, and the plaintiff declared as for a total loſs of the goods inſured, by perils of the ſea, and the *ſtranding of the ſhip*.—Upon the trial of the cauſe, it appeared, that the ſhip, on the 29th of *January* 1795, in the courſe of the voyage, arrived off *Scilly*, and that morning ſtruck upon a ſunken rock about three leagues from the iſland. That ſhe did not remain on the rock; but, in conſequence of the ſtriking thereon, ſeveral of her planks were ſtarted, and the water immediately flowed into the hold and over the cargo, and continued to increaſe in the hold for about three hours. That about

A ſhip, with a cargo of fruit, ſtruck on a ſunken rock, and received great damage, ſo that it became neceſſary to run her on ſhore, in order to ſave both ſhip and cargo. The ſhip, however, arrived at her port of deſtination, but with the fruit greatly damaged, not by the *ſtranding*, but ſolely in conſequence of the ſtriking on the rock.—The inſurer is liable for this partial loſs, though it did not ariſe from the ſtranding.

Burnett v. *Kinſington*, 7. T. R. 210. S. C. Eſp. Rep. 416.

(*a*) In *Cantillon* v. *Lond. Aſſur.* ſup. 140.—(*b*) In *Bowring* v. *Elmſlie*, ſup. 145, and *Neſbitt* v. *Luſhington*, ſup. 147.—(*c*) In *Wilſon* v. *Smith*, ſup. 141, and *Cocking* v. *Fraſer*, ſup. 144.—(*d*) In *Neſbitt* v. *Luſhington*, ſup. 147.

noon the ſame day, the ſhip was ſtranded upon the beach at *Scilly*, by the captain, under the directions of the pilot from the iſland, in order to ſave the ſhip and cargo. That the ſhip continued ſome time on the beach, during which the water flowed in and over part of the cargo, at the return of the tide. That ſhe afterwards proceeded on her voyage, and arrived at *Plymouth* on the 24th of *February* with the greateſt part of her cargo. That the fruit was very much damaged, and a ſmall part of it left at *Scilly*, being intirely unfit for uſe. That the ſhip received no damage in conſequence of the *ſtranding*; but that the damage ſhe received was entirely from the rock on which ſhe ſtruck; which alone occaſioned the damage to the cargo, partly by the water which flowed into the ſhip previous, partly by that which flowed in ſubſequent, to the ſtranding.—There was a verdict for the plaintiff, ſubject to the opinion of the court upon the above facts. —The only queſtion was, whether, as the ſhip was in fact ſtranded in the courſe of her voyage, the inſurers were liable for a partial loſs, ariſing ſolely from the perils of the ſea, and not from the act of ſtranding.—The court, after two arguments, were of opinion in the affirmative, that the plaintiff was intitled to recover the whole partial loſs.—Lord *Kenyon* ſaid, —"The words of the policy are general, including all caſes: Then comes the memorandum, "corn, "fiſh, ſalt, fruit, flour, and ſeed, warranted free from "average, *unleſs general*, or *the ſhip be ſtranded*." This, therefore, lets in a general average; and I do not know how to conſtrue the words grammatically, but by ſaying, that *if the ſhip be ſtranded, that deſtroys the exception, and lets in the general words of the policy*. If a general proviſion be made in any inſtrument, and it be there ſaid, that certain things ſhall be excepted, unleſs another thing happen; if that other thing do happen, it deſtroys the exception, and gives effect to the general operation of the deed.—Without entering into the reaſons for introducing this exception, on the grammatical conſtruction of the whole, I have no doubt.—The caſe of *Cantillon* v. *Lond. Aſſ. Comp.* as ſtated by Sir *Fletcher Norton*, in 3 *Bur.*

If the ſhip be ſtranded, that deſtroys the exception, and lets in the general words of the policy.

1553 (*a*), which is better authority than *Magens*, is a judicial deciſion on the very point, by a jury of merchants, under the directions of Lord C. J. *Ryder*, who held that the words, "*or the ſhip be ſtranded*" amounted to a *condition*, and that, by the ſhip's being ſtranded, the inſured was let in to claim his whole partial loſs. This deciſion was acquieſced in at the time, and the inſurance companies altered the form of their policies in conſequence of it. Generally ſpeaking, if I were bound to decide between the opinions of Lord *Mansfield* and Lord C. J. *Ryder*, perhaps I ſhould be guided by the former in preference to the latter: But what fell from him in the caſe of *Wilſon* v. *Smith* (*b*) was only an *obiter dictum*; and I confeſs it does not bring conviction to my mind. With regard to *Cocking* v. *Fraſer* (*c*), it is ſufficient to ſay, that there was no ſtranding in that caſe: What was there ſaid was likewiſe an *obiter dictum*; and I cannot ſubſcribe to the opinion there given, that 'if *the commodity ſpecifically re-* 'main, *the underwriter is diſcharged*:' But if fiſh be deteriorated by the accident of *ſtranding*, the underwriters would be anſwerable, though the article ſpecifically remained. If it had been intended that the underwriters ſhould only be anſwerable for the damage that ariſes in conſequence of the ſtranding, a ſmall variation of expreſſion would have removed all difficulty; they would have ſaid, unleſs for loſſes *occaſioned* by ſtranding: But, in the body of the policy, they have inſured againſt all loſſes from the cauſes there enumerated, which include ſtranding; and then follows this memorandum, the evident meaning of which is, 'free from average unleſs ge-'neral or *unleſs* the ſhip be ſtranded:' So that, if the ſhip be ſtranded, the inſurers ſay they will be anſwerable for an average loſs. That appears to me to be the true ſenſe and grammatical conſtruction of the policy; and thinking ſo, I am bound to give the ſame opinion I formerly gave (*d*), not becauſe I gave that opinion before, but becauſe I am convinced by the reaſoning that led to

(*a*) Sup. 140.—(*b*) Sup. 141.—(*c*) Sup. 144.—(*d*) In the caſes *Neſbitt* v. *Luſhington*, ſup. 147, and *Bowring* v. *Elmſlie*, ſup. 145.

it,"

it."—Mr. Juſtice *Aſhurſt* ſaid,—"As it is difficult, where a ſhip is ſtranded, to determine whether or not the damage to the cargo aroſe from the ſtranding, or in what degree it was imputable to that cauſe, this memorandum ſeems to have been introduced to avoid that inquiry, and that, when the ſhip has been ſtranded, the inſurers conſent to aſcribe the loſs to that cauſe. This conſtruction, which has already been put on the memorandum in the caſes of *Cantillon* v. *Lond. Aſſ. Comp.* and *Neſbitt* v. *Luſhington*, will prevent endleſs litigation."—Mr. Juſtice *Lawrence* ſaid,—"Although the jury found that part of the damage happened *after* the ſtranding; it is alſo found as a fact, that the ſhip received no damage *in conſequence of the ſtranding*; and if the ſhip had not been ſtranded, both the ſhip and cargo would have been totally loſt. The queſtion, therefore, is, whether an average loſs is payable to any amount, however great, *from whatever cauſe it may ariſe*, if the ſhip happen to be ſtranded. If the exception in the memorandum be confined to loſſes *ariſing* from the ſtranding, it muſt be from this conſideration, that otherwiſe it might be a temptation to the maſter to ſtrand the ſhip, if any trifling damage were done to the cargo, to enable the inſured to recover.—However, where the words of the policy are inaccurate, and where there are inconveniencies attending each conſtruction of it, if the caſe has ever been decided, I think we ought to be guided by it. In the caſe of *Wilſon* v. *Smith*, Lord *Mansfield* ſeemed to think, that the word "*unleſs*" did not create a *condition*; but that the meaning of the exception was, that the underwriters ſhould only be liable for a partial loſs in two caſes, one where there is general average, the other where the damage *ariſes* from the ſtranding. But, in ſo conſidering it, Lord *Mansfield* went beyond the facts of the caſe then before the court; for there the queſtion was, whether the inſured was entitled to recover a partial loſs from the circumſtance of his being intitled to a general average: Now the words of the exception are not "warranted free from average, *unleſs there be a general average*, or unleſs the

the ſhip be ſtranded;" but warranted free from average, "unleſs general, or the ſhip be ſtranded." Therefore, as there is a difference in the expreſſion of theſe two exceptions, perhaps it may be conſidered as a *condition*, as applied to the *ſtranding*, though it be not a condition, as applied to the *average*. If ſo, then there is only one authority in point, that of *Cantillon* v. *Lond. Aſſurance*, in which caſe it was conſidered, that the ſtranding was a condition, and that the underwriters were liable on the happening of that condition. Therefore, as the very queſtion has been once decided, I think it ought to govern our deciſion in this caſe, eſpecially as the queſtion ariſes on the conſtruction of an inſtrument ſo inaccurately penned as a policy of inſurance.

Whether the memorandum exempts the inſurer from the *total loſs* of an *entire* individual.

Notwithſtanding the number of caſes which have been decided upon the conſtruction of the memorandum, it ſtill remains a queſtion, whether the partial loſſes from which the inſurer is exempted by it, comprehend the *total loſs* of an *entire individual*, as well as a partial injury to the *whole* of the ſpecies of goods exempted by the memorandum from ſmall average loſſes: As if out of 101 hogſheads of ſugar of equal value, 5 are ſo completely ſpoiled in the voyage as to be worth nothing, and therefore *totally loſt*.—If this loſs be calculated upon the whole 101 hogſheads, it will not amount to 5 *per cent.*—In ſuch a caſe, it has been thought, that the inſurer would be protected by the memorandum, and not liable for the loſs (*a*). As the queſtion has never been directly agitated in our courts, I will not preſume to ſay how it ought to be decided.

(*a*) Vid. 1 *Mag.* 73, 2 *Bur.* 1170, inf. ch. 14. § 1.

Sect.

Sect. 4.

For what loſſes the owners and maſter of the ſhip are liable.

There are loſſes which do not ariſe from the perils of the ſea, and for which the owners are liable.

THERE are certain injuries and loſſes to which goods on ſhip-board are expoſed, which cannot properly be ſaid to ariſe from the perils of the ſea; but are imputable to the owners of the ſhip, or to the negligence or miſconduct of the perſons employed by them on board. In all ſuch caſes, the owners, in reſpect of the freight, are anſwerable to the owner of the goods, for ſuch loſs or damage, ſubject, however, to certain regulations and reſtrictions which we ſhall preſently have occaſion to notice.

As if damage happen to goods on board by the fault of the ſhip, not occaſioned by ſea damage.

Thus, if any loſs or damage happen to the goods, from any fault or defect of the ſhip, not ariſing from the violence of the wind or ſea, or from any accident or misfortune in the voyage, but from ſome latent defect before ſhe ſailed; the owner of the goods has his remedy againſt the owners of the ſhip, for ſuch loſs or damage; and the inſurer, in ſuch caſe, is not liable, becauſe, in every contract of inſurance, there is an implied warranty, that the ſhip is ſea-worthy; and if it appear that ſhe was not ſo, the contract is void (*a*).

In many caſes the maſter alſo is liable.

In many caſes, the maſter alſo, as well as the owners, is anſwerable; for though his appointment gives him no property in the ſhip, either general or ſpecial, yet it is the policy of the law to hold him reſponſible for all loſs or damage that may happen to the goods committed to his charge, whether it ariſe from the negligence, ignorance, or wilful miſconduct of himſelf or his mariners, or any other on board the ſhip. As ſoon, therefore, as goods are put on board, they are in the maſter's charge; and he is bound to deliver them again in the ſame ſtate in which they were ſhipped; and he, as well as the own-

He is bound to deliver goods in the ſame ſtate in which he received them. And he, as well as the owners, is liable for all loſs or damage not proceeding

(*a*) Vid. *Val.* tom. 1, p. 654. *Pothier*, h. t. n. 66. *Emerig.* tom. 1, p. 580.

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ers, is anſwerable for all loſs or damage they may ſuſtain, unleſs it proceed from an inherent defect in the article, or from ſome accident or misfortune, which could not be foreſeen or prevented. The maſter, therefore, as well as the owners, is liable for all injuries occaſioned by bad ſtowage, or the goods being expoſed to wet; for loſſes by theft or embezzlement of the maſter or mariners on board (*a*); and alſo for damage done by rats, unleſs it appear that all neceſſary precautions were uſed to prevent it (*b*).—This is the rule of the marine law (*c*), and with it agrees the common law of *England*, which conſiders the owners, as well as the maſter, as common carriers, and anſwerable for all loſſes, except ſuch as ariſe from the act of God, the King's enemies, or the perils of the ſea. This is ſtrongly exemplified in the following caſe.

from ſome inevitable misfortune.

They are anſwerable for loſs or damage occaſioned by bad ſtowage, wet, theft, embezzlement, rats, &c.

This is the rule of the marine law, and agrees with the common law.

A quantity of goods were ſent on board a ſhip, and after they were ſtowed, a number of perſons, under pretence of being preſs-maſters, entered the ſhip in the night, and robbed her of the goods.—An action being brought againſt the maſter, by the owner of the goods, it was contended on the part of the maſter, that no negligence was imputable to him; that he had a ſufficient guard on board, and the goods were all locked up under the hatches, and that the thieves came as preſs-maſters, and by force robbed the ſhip; that this was that ſort of *vis major*, which he could not reſiſt; and that though he was maſter of the ſhip, yet he had no ſhare in her, and was only in nature of a ſervant, acting for a ſalary.—But the court determined that the plaintiff was intitled to recover: For the maſter, at his peril, muſt ſee that all things are forthcoming that are delivered to him, whatever accident may happen, the act of God, or the King's enemies, and the perils of the ſea, only excepted: But for fire, thieves, and the like, he muſt anſwer, as a

If a number of perſons enter a ſhip, under pretence of being a preſs gang, and with violence rob the ſhip of goods on board, the maſter ſhall anſwer for theſe goods, though he had taken all proper precautions to ſecure the goods, and though he was unable to reſiſt the robbers.

Merſe v. *Slue*, *Molloy*, b. 2. c. 2. § 1. S. C. 1 *Vent.* 190. 238. T. *Ray.* 220. 2 *Danv.* 12, 3 *Keb.* 72. 112. 135.

(*a*) *Mal.* lex merc. 117, 118. *Le Guidon*, c. 5, art. 5 and 6, *Cleirac*, p. 254, *Roc.* n. 49, *Emerig.* vol. 1, p. 377.—(*b*) *Emerig.* vol. 1, p. 377.—(*c*) Vid. *Roc.* n. 49, *Cleirac*, p. 254, *Le Guidon*, c. 5, art. 5 and 6, *Molloy*, b. 2. c. 1. § 5, and. c 2. § 2.

common

common carrier, and though he has no ſhare in the ſhip, and only receives a ſalary, yet he is *a known public officer*, whom the law looks upon as anſwerable; and the owner of the goods has his election to charge either the maſter or the owners, or both, at his pleaſure; but he can have but one ſatisfaction.

This carries the principle of reſponſibility farther than the marine law carries it.

I take this caſe from *Molloy*, though it is reported in various other books, becauſe he himſelf appears to have argued it. It ſeems to carry the principle of reſponſibility farther than it is carried by the marine law. Simple theft or embezzlement by perſons on board, not being attributable to accident, is not deemed a peril of the ſea (*a*). But *robbery* is a peril which cannot be foreſeen or prevented (*b*). An inſurer is not anſwerable for ſimple theft by perſons on board the ſhip; becauſe it may be reaſonably attributed to the want of proper vigilance in the maſter: But he is liable for a robbery, committed with violence, by perſons not belonging to the ſhip; for the word *thieves* in the policy means thieves *aſſailing from without*, and not thieves among the crew (*c*). Robbery, in this ſenſe, is a ſpecies of piracy; indeed the only difference between robbery and piracy is, that the one is generally underſtood to be a plundering on land, the other a plundering at ſea. *Inter piratam et latronem nulla alia eſt differentia, niſi quia pirata depredator eſt in mari* (*d*).—The robbery mentioned in the above caſe, unqueſtionably amounted to piracy, according to the opinion of Lord *Kenyon* in *Neſbitt* v. *Luſhington* (*e*), though it was committed in the river *Thames*; and this, by the marine law, is a peril of the ſea: But the court, aſſimilating the caſe of a maſter of a ſhip, to that of a common carrier, held it no excuſe that the defendant had taken all proper precautions for the ſafety of the goods, and that the robbery had been committed by perſons *aſſailing from without*, and with a force which he was unable to reſiſt.—It is to be obſerved, however, that it

(*a*) Furtum non eſt caſus fortuitus. *Roc.* n. 42.—(*b*) Latrocinium fatale damnum, ſeu caſus fortuitus eſt. *Roc.* n. 43.—(*c*) *Malyne*, c. 25. *Beawes* 313, 5th ed.—(*d*) Santerna p. 4. n. 50.—(*e*) Sup. 147.

appears

appears from the report of this caſe in *Ventris*, that Lord C. J. *Hale*, in delivering the opinion of the court, ſaid, "that this caſe was not to be meaſured by the rules of the admiral law; becauſe the ſhip, which, at the time of the robbery, lay in the river *Thames*, was *infra corpus commitatus*; and therefore the caſe did not differ from that of a common hoyman (*a*)."

If goods are delivered to the maſter on ſhore, he is anſwerable for them as much as if delivered on board the ſhip (*b*). So is he anſwerable by the general law for the ſafety of the goods from plunder or damage, while they are in his boats or barges to be put on board or landed; becauſe thoſe boats or barges are conſidered as attached to, and making a part of the ſhip. And if any loſs or damage happen in the ſhipping or landing of the goods, through the fault of the maſter or his crew, or the defect of the ſhip's tackle, the maſter and the owners are reſpectively anſwerable. If the loſs or damage, in ſuch caſe, be not imputable to the maſter or crew, or to the defect of the ſhip's tackle, then the inſurer is anſwerable (*c*). But, till the goods are ſafely landed and delivered to the conſignee, the liability both of maſter and owners continues (*d*).

If a loſs happen in the ſhipping or of landing goods, by the fault of the maſter or crew, or the defect of the ſhip's tackle, the owners and the maſter are each liable.

At common law, this liability of the owners and maſter of the ſhip extended to the full amount of the loſs; and the *maſter's liability* ſtill remains the ſame. But it was found that the liability of the owners of ſhips to *the amount of the full value* of goods put on board, and made away with by the maſter or mariners, very much tended to diſcourage perſons from adventuring their fortunes as ſhip-owners, therefore the ſtat. 7 *G.* II. c. 15,

At common law, the owners and maſter were liable to the full value of the goods loſt. But now, by 7 *G.* II. c. 15. they ſhall only be liable to the value of the ſhip and freight for any act done by the maſter or mariners.

(*a*) Vid. 1 *Vent.* 238.—(*b*) Nauta qui recepit à Titio merces in littore maris, ſi ibi merces perierint, periculo ipſius nautæ pereunt, tanquam ſi eſſent in navi receptæ, et hoc procedit quia ſufficit nautam ſic recipiſſe, & propterea in ejus periculo ſunt. *Roccus* de navib. n. 88.—(*c*) *Le Guidon*, c. 5. art. 7. Vid Laws of *Oleron*, art. 10, Laws of *Wiſbuy*, art. 49, *Emerig.* vol. 1, p. 678.—(*d*) *Emerig.* vol. 1, p. 679.

provides,

provides, 'That no owner of any ſhip ſhall be liable for 'any loſs or damage occaſioned by any embezzlement, 'ſecreting, or making away with any gold, ſilver, jewels, 'or other merchandize on board, or for any act, matter, 'damage, or forfeiture, done or incurred, by the maſter 'or mariners, without the privity or knowledge of the 'owners, further than the value of the ſhip, and the 'freight due for the voyage; and where there are ſeve-'ral proprietors of the goods on board, and the value of 'the ſhip and freight be inſufficient to compenſate for 'the loſs of each; they ſhall receive an average in pro-'portion to their reſpective loſſes.—And they, as 'well as the owners of the ſhip, may exhibit a bill for 'a diſcovery of the amount of the loſs, and the value of 'the ſhip, and for a diſtribution thereof; and if ſuch 'bill be exhibited by the owners, they ſhall annex an 'affidavit that they do not collude with the defendants. '—But it is provided, that this act ſhall not leſſen the 'remedy againſt the maſter and mariners, in reſpect of 'ſuch embezzlement, &c.'

But as this proviſion only extended to the caſe of embezzlement, &c. by the maſter or mariners, it did not afford a ſufficient protection to ſhip owners. Therefore the 26 *G.* III. c. 86. limits the liability of the owners to the value of the ſhip and freight, though the maſter or mariners ſhould not be privy to ſuch robbery, &c. and they are exempt from all liability for any loſs by fire.

As this act extends only to caſes where the embezzlement, &c. is committed by the maſter or mariners, it was not found a ſufficient protection to ſhip-owners; and therefore the ſtat. 26 *G.* III. c. 86, recites, "That all maſters and owners of ſhips are, by law, reſpectively liable to anſwer for the full value of all goods ſhipped on board, notwithſtanding ſuch goods be loſt by robbery, fire, or other accident, (other than the King's enemies, the perils of the ſeas, or the act of God), or unleſs the maſter or ſome of the ſhip's company be privy to ſuch robbery, in which caſe alone the reſponſibility of the owners is, by the ſtat. 7 *G.* II. c. 15, limitted to the value of the ſhip and freight." It then enacts, 'That no 'owner ſhall be anſwerable for any loſs or damage by 'reaſon of any robbery, embezzlement, &c. of any goods 'on board, or for any act, &c. done without their pri-'vity or knowledge, beyond the value of the ſhip and 'freight, although the maſter or mariners ſhall not be 'concerned in the robbery, &c.; nor anſwerable for any 'loſs or damage to goods occaſioned by fire on board;

nor

'nor ſhall the maſter or owners be liable for the loſs of 'any gold, ſilver, jewels, &c. by means of any robbery, '&c. unleſs the ſhipper inſert in the bill of lading, or 'otherwiſe declare, the quality and value thereof.'

From theſe parliamentary regulations it appears, that though the reſponſibility of the maſter, except in the inſtance mentioned in the laſt clauſe, remains the ſame as it was before; yet, that of the owners is limited to the value of the ſhip and freight, in all caſes of theft, embezzlement, &c. without their privity, whether by the crew, or by ſtrangers; and that they are wholly exempt from all loſſes occaſioned by fire.

But though the owners are reſponſible to the amount of the value of the ſhip and freight, for loſſes occaſioned by external thieves; yet, under the policy, the inſurers are alſo liable (*a*); and therefore, in ſuch caſes, the proprietor of the goods, or the inſurers in his name, may recover againſt the owners.

But the inſurer as well as the owner of the ſhip is liable for external thefts.

Sect. 5.

What ſhall be the Duration of the Riſk.

TO charge the inſurer, it is not enough that a loſs has happened at ſea; it muſt appear to have happened in the courſe of the voyage, and during the continuance of the riſk, inſured (*b*).

To charge the inſurer, the loſs muſt happen during the continuance of the riſk.

Every voyage inſured muſt have a *terminus à quo* and a *terminus ad quem*. When the inſurance is for a limited time, the two extremes of that time are the *termini* of the voyage inſured. When a ſhip is inſured, both outward and homeward, for one entire premium; this, with reference to the inſurance, is conſidered but as one voyage; and the *terminus à quo* is alſo the *terminus ad quem*.

Every voyage inſured muſt have a fixed commencement and end.

We will conſider the duration of the riſk, *firſt*, with reference to inſurances upon *goods*, *ſecondly*, upon the *ſhip*, and *thirdly* upon *freight*.

(*a*) *Harford* v. *Maynard*, coram Lord *Mansfield* at G. H. Hil. vac. 1785, *Park* 25.—(*b*) *Roccus*, h. t. n. 18.

1. *Upon Goods.*

The time of the commencement and end of the risk *on goods* in other countries.

By the ordinances of *France*, and of most other countries, it is provided, that if the time of the risk be not regulated by the contract, it shall commence, *as to goods*, from the time they are put on board the ship, or put into barges, to be conveyed on board, that is, from the moment they leave the shore; and it continues till they are safely landed at the place of their destination. And the insurer does not only run the risk while the goods are in the ship named in the policy, but also in the boats or lighters that shall be employed in bringing them on board and carrying them on shore. The reason assigned for this is, because the perils of the sea commence from the moment the goods are on the water (*a*).

In *England*.

In our policies, the words usually employed to express the commencement and end of the risk on goods are these,—'Beginning the adventure upon the said goods 'and merchandizes *from the loading thereof aboard the said 'ship*, and so shall continue and endure until the said ship with 'the said goods, shall be arrived at [her port of 'delivery], and until the same be discharged and safely 'landed.'—So that, with us, it is plain that the risk does not commence until the goods are actually on board the ship; and therefore the insurer is not answerable for any loss or damage which may happen to them, while they are on their passage to the ship. And it may be laid down as a general rule, that the risk on goods continues no longer than they are actually on board the ship mentioned in the policy; and that if they be removed from on board that ship and landed, or put on board another ship, without the consent of the insurers, the contract is at an end, and the insurers are discharged from all subsequent responsibility.

In general, the risk continues on goods while they are on board the ship mentioned in the policy.

But to this rule there are exceptions.

But to this rule there are certain exceptions, founded in necessity, which it will be proper to mention in this place.

As where the ship is disabled and the goods are put on board another vessel to be forwarded to their port of delivery.

Where the ship is disabled in the course of the voyage, so as to be incapable of proceeding to her port of destination, and it becomes necessary to shift the goods

(*a*) Vid. 1 *Mag.* 44. *Emerig.* tom. 1, p. 14. Ord. of *Louis* XIV, tit. *Contrâts à la grosse*, art. 5.

insured

inſured on board another veſſel, in order to be conveyed thither: In that caſe, though it has been thought that the inſurers are thereby diſcharged (*a*), yet it is now clearly ſettled, that the riſk continues, and that the inſurers are liable for any loſs that may happen to the goods on board the new ſhip (*b*).

So, if it be agreed that the goods inſured, may, at a particular place, in the voyage, be removed from on board the ſhip in which they are to be brought thither, and put on board other ſhips to be carried to their port of delivery; but, on their arrival at the place, there being no ſhips to receive them, they are put on board a *ſtore-ſhip*, which is ſtationary there, to be kept till ſhips bound to their place of deſtination arrive: In this caſe, the riſk continues on the goods on board the ſtore-ſhip, and if they be loſt on board her, the inſurer is anſwerable. This was determined in the following caſe.

So, if it be agreed, that the goods ſhall be removed into another ſhip at a particular place in the voyage, and there being no ſhip there, they are put on board a ſtore-ſhip.

An inſurance was made *on goods* in a *Dutch* ſhip,—"From "*Malaga* to *Gibraltar*, and at and from thence to *Eng-* "*land* and *Holland*, both or either; the adventure to "begin from the loading, and continue till the ſhip and "goods arrive ſafely in *England* or *Holland*, and are there "ſafely landed."—"It was agreed, that upon the ar- "rival of the ſhip at *Gibraltar*, the goods might be un- "loaded and reſhipped on board one or more *Britiſh* ſhip "or ſhips for *England* and *Holland*, and to return one "*per cent.* if diſcharged in *England*."—In an action on this policy, it appeared in evidence, that when the ſhip came to *Gibraltar*, the goods were unloaded and put into a *ſtore-ſhip*, (which it was proved was always conſidered as a warehouſe), and that there was then no *Britiſh* ſhip there. Two days after, the goods on board the *ſtore-ſhip*, were loſt in a ſtorm.—In an action on the policy, it was inſiſted for the defendant, that the inſurance was only on goods on board the *Dutch* and *Britiſh* ſhips, and that it did not extend to the ſtore-ſhip, which

Goods inſured from *A.* to *B.* with liberty to put them in one or more ſhip or ſhips, at *C.* to be forwarded to *B.* their place of deſtination.—There being no ſhips at *C.* when the goods arrive, they are put on board a ſtore-ſhip till ſhips do arrive;—The riſk continues in the ſtore ſhip.

Tiernay v. *Etherington*, cited 1 *Bur.* 348.

(*a*) Vid. *Molloy*, b. 2. c. 7. §. 11.—(*b*) The ſubject of *changing the ſhip* will be found fully treated, inf. chap. 11, §. 3.

is conſidered as a warehouſe at land, and ſo not a peril of the ſea.—But it was ruled by Lord C. J. *Lee*, that the plaintiff was entitled to recover;—'For,' ſaid his Lordſhip, 'in the conſtruction of policies, the *ſtrictum jus*, or *apex juris*, is not to be laid hold of; but they are to be conſtrued largely for the benefit of trade, and for the inſured. But it would be a ſtrict conſtruction to confine this inſurance to the unloading and reſhipping, and the accidents attendant thereon. The conſtruction ſhould be *according to the courſe of trade in this place*, where the uſual method of unloading and reſhipping is, that when there is no *Britiſh* ſhip there, then the goods are kept in ſtore-ſhips. Where there is an inſurance on goods on board ſuch a ſhip, that inſurance extends to carrying the goods on ſhore in a boat. So, if an inſurance be on goods to ſuch a *city*, and the goods are brought in ſafety to ſuch a *port*, though diſtant from the city, that is a compliance with the policy, if that be the uſual place to which the ſhips come. Therefore, as here is a liberty given of unloading and reſhipping, it muſt be taken to be an inſuring under ſuch methods as are proper for unloading and reſhipping. There is no neglect on the part of the inſured, for the goods were brought into port the 19th and loſt the 22d of *November*. This manner of unloading and reſhipping is to be conſidered as the neceſſary means of attaining that which was intended by the policy, and ſeems to be the ſame as if it had happened in the act of unſhipping from one ſhip to another. This is not to be conſidered as a ſuſpenſion of the policy; for as the policy would extend to a loſs happening in the unloading and reſhipping from one ſhip to another, ſo any means to attain that end come within the meaning of the policy.'—Accordingly the plaintiff had a verdict.—A new trial was moved for; but it was refuſed by Lord J. C. *Lee*, Mr. Juſtice *Chapple*, and Mr. Juſtice *Deniſon*; againſt the opinion of Mr. Juſtice *Wright*; who thought that it was a removal at the peril of the inſured.

Policies are to be conſtrued largely for the benefit of trade.

An inſurance on goods extends to carrying them on ſhore.

If an inſurance on goods be to ſuch a *city*, it is ſufficient to bring them to the *port* to which goods deſtined for that city are uſually ſent.

But the words of the above clauſe ſhew, that the riſk on goods, in *Engliſh* policies, like foreign ones, continues till they are "*diſcharged, and ſafely landed*" at the port of delivery.

And the inſured is protected by the policy in carrying the

very.—And the inſured has a right to land them at any wharf or place, within the port, where ſuch goods are uſually landed.—For inſtance, all the ſhips laden with hemp for the port of *London*, do not land it at the cuſtom houſe; but it is often carried down the river in lighters, and landed at different wharfs on each ſide of the river. If, therefore, a cargo of hemp be inſured from a foreign port to the port of *London*, and the conſignee be deſirous of landing it at *Woolwich*, *Chatham*, or any other place within the port of *London*, where hemp is uſually landed, it would ſeem that he might ſend it in lighters from the ſhip to ſuch place under the protection of the policy. For policies of inſurance ought always to be conſtrued according to the courſe of trade in the place; and miſtakes and doubtful paſſages ought to be interpreted in favour of the inſured (*a*).

goods in lighters to any part of the port of delivery, where ſuch goods are uſually landed.

Policies ought to be conſtrued according to the uſage of trade, and in doubtful caſes, in favour of the inſured.

But though the general rule is, that the inſurance on goods ſhall continue "*till they are diſcharged and ſafely* "*landed*," yet it has been holden, by a very eminent and learned judge, that if the inſured take goods from on board the ſhip in his own lighter, the inſurer is diſcharged.

Thus:—Goods were inſured to *London*, "*and until the ſame ſhould be ſafely landed there.*"—On the ſhip's arrival, the owner of the goods ſent *his own lighter*, and received them out of the ſhip; but before they reached the ſhore, an accident happened, by which they were damaged.—For this loſs, an action was brought againſt the inſurer.—On the part of the defendant, it was inſiſted, that the accident happening after the owner had taken the goods into his own poſſeſſion, it was a loſs after the inſurance was ended.—To this it was anſwered, that if this had been an action againſt the maſter or owners of the ſhip, that objection would have been a good anſwer to it, for they were certainly diſcharged: But in this action it would be no anſwer; for it might as well be ſaid, that during the whole voyage, the goods were in the poſſeſſion of the inſured, who took the ſhip to freight, and whoſe ſervant the maſter was, to this purpoſe, as much as the lighterman: That, in the caſe of ſhips of great burthen, which are forced to lie off, there may be a carriage of

If the owner of goods inſured take them from on board the ſhip in his own lighter, the inſurer is diſcharged.

Sparrow v. *Carruthers*, at N. P. 2 *Str.* 1236.

(*a*) 1 *Mag.* 48.

many miles in boats and lighters, and it was in the course of trade for the owner of the goods to send his lighter. ---But Lord C. J. *Lee* held, that the insurer was discharged.---He said it would have been otherwise if the goods had been sent by the ship's boat, which is considered as part of the ship, and its passage part of the voyage. The jury (of merchants) thought it turned on that distinction, and found a verdict for the defendant accordingly.

Observations on this case.

But it would seem, that if it were the usage of a particular trade, that all the goods in that trade should be landed by the owners of such goods in their own lighters, the risk would continue even in those lighters, otherwise the words of the policy "*until safely landed,*" would, as far as related to that particular trade, be nugatory. And the principles laid down by the same learned judge, in the case of *Tiernay* v. *Etherington* (*a*), seem to warrant this distinction.---The two following cases will shew, that the risk continues on goods on board a common public lighter, though hired and employed by the owner of the goods for the purpose of landing them; this being done in the ordinary course of trade.

Where goods are put into a public lighter for the purpose of being landed, the risk continues: But if the merchant send *his own lighter*, this will be a delivery to him, and the insurer is discharged.

Rucker v. *Lond. Assur. coram Buller* J. at N. P. *June* 8, 1784.

An insurance was made on the ship *Sophia*, and on goods on board, "At and from *Grenada* to *London*;---on the ship till moored 24 hours, and on the goods, till discharged and safely landed."---In an action on this policy, the declaration stated, that before the goods, which consisted of sugars, were discharged and landed, they, by the perils of the river *Thames*, and the waters thereof, were washed away and lost.---On the trial it appeared, that the owners of the goods, for the purpose of landing them, had employed one of the public lightermen, who work on the river for hire, and whose lighters are numbered and entered at *Waterman's Hall*, without which no lighter is allowed to work on the river. On board of this lighter were put 57 hogsheads of sugar; and there were two men on board, (the usual complement for a lighter), beside the second mate of the ship. The lighter,

(*a*) Sup. 164.

as it was proceeding to the ſhore, ſtruck upon the anchor of a ſhip, and ſunk through unavoidable accident, and without any imputation of negligence in any perſon on board. The ſugars being much damaged, the plaintiff went for the average loſs.---On the part of the defendant, it was contended, that though, by the policy, the riſk was to continue till the goods were ſafely landed, and this was underſtood to mean, by the ſhip's boats, yet the cuſtom of trade had, in ſome inſtances, ſubſtituted lighters. But here the merchants had taken upon themſelves to employ the lighter, and this not being in the courſe of trade, the underwriters were diſcharged from the ſubſequent loſs; for a merchant may, for his own convenience, depart from the uſual courſe of trade. ---Mr. Juſtice *Buller*, in his addreſs to the jury, ſaid; ---"The deciſion of this cauſe depends on the uſage; but the fact of uſage being once eſtabliſhed, the queſtion whether the underwriter is liable or not is matter of law. But it belongs to the jury to ſay, whether that which has been done here, be or be not within the uſual courſe of trade. The diſtinction is between *public* lighters, and thoſe which are the property of the merchant, and work only for him. Public lighters have a *ſtamp of authority*. They are entered at *Waterman's Hall*. The caſe of *Sparrow* v. *Carruthers*, does not affect this caſe. If a merchant will not ſend public lighters, it ſhall be a delivery to him when the goods are put on board his own lighter. But lightermen, appointed by the waterman's company, are *public officers*, and have a public credit."--- The jury adopted this opinion, and found for the plaintiff.

A ſhip and goods were inſured from *Peterſburgh* to *London*. In an action upon the policy, it appeared, that the ſhip and cargo, conſiſting of hemp, arrived ſafe in the *Thames*: That the plaintiffs being the conſignees of the goods, employed a lighterman belonging to one of the public lighters, entered at *Waterman's Hall*, to land the hemp: That the hemp was damaged on board the lighter, but without any negligence imputable to the lighterman: That it is the conſtant practice for merchants in the *Ruſſian* trade to land their goods by means of lighters,

The conſignee of goods in the port of *London* employs a common lighterman to land them. In the paſſage to the ſhore the lighter is ſunk by unavoidable accident.—This is a loſs within the policy.

Hurry and others, v. *Roy. Ex. Aſſur.* C. B. *Eaſter*, 1801.

lighters, and that there are no other lighters now in use among the merchants, but the public lighters.---Upon these facts, a verdict was found for the plaintiffs, with liberty to the defendants to move to enter a nonsuit, on the ground, that the insurance was discharged by the delivery of the hemp into the lighters employed and paid by the consignees of the cargo.---Upon this being moved, it was contended on the part of the defendants, that the rule laid down in the above case of *Sparrow* v. *Carruthers* (*a*), must apply to this case, the possession of the goods being altered, by the owner taking them into his own custody; and that it made no difference whether the lighter was public or private, because the person who hired it, made it his own *pro hâc vice*, and that the goods, while on board it, were completely in his own custody. ---But the court (*b*) determined that the defendants were answerable for the loss which happened in the lighter.--- Mr. Justice *Heath* said,---"The question in this case is, whether the goods insured have been *safely landed*, within the meaning of the policy. To every part of the policy we must give effect. It is admitted, that the unloading of *Russian* ships is entirely carried on by public lighters, and that no private lighters are ever employed in that business. Then, what effect is to be given to the words, "*until the goods are safely landed*," if they do not extend to the goods when on board the public lighter; for in no other manner can they be safely landed. It is true, that the master and owners of the ship were discharged, when the goods were put into the lighter; but the freight and insurance are not commensurate; the latter is far more extensive than the former. As to the case of *Sparrow v. Carruthers*, I think it ought not to be extended. It was only a *nisi prius* decision, which, though often cited, has never been recognised. I do not mean, however, to quarrel with that decision. --Mr. Justice *Rooke* said,--- "I cannot agree, that this case depends on the question,

(*a*) Sup. 165.—(*b*) *Heath*, *Rooke*, and *Chambre*, Justices, Lord *Eldon*, C. J. was absent.

who

who employs the lighter. Whether it be employed by the owner of the goods, or the owner of the ſhip, the danger is the ſame, and the riſk of the inſurer ought alſo to be the ſame."---Mr. Juſtice *Chambre* ſaid,---"The argument for the defendants reſts entirely on the caſe of *Sparrow* v. *Carruthers*. I do not wiſh to ſhake the authority of that caſe; nor, indeed, is it neceſſary to do ſo: But I cannot help obſerving, that if the deciſion had been different, I ſhould have been better ſatisfied with it. The only ground upon which it can be ſupported, is, that the owner of the goods completely accepted them, and diſcharged the owner of the ſhip from any further concern in them (*a*). But the caſe before Mr. Juſtice *Buller* (*b*) has more weight with me. In the preſent caſe, I rely on the words of the policy, and the known and ſettled uſage of the trade."

The policy affords protection in the port of delivery, only till the goods can be conveniently landed and no longer.

Though the riſk on goods, according to the uſual words of the policy, is to continue till they are diſcharged and ſafely landed at the port of delivery, this is not to be underſtood as an authority to prolong the riſk after the ſhip's arrival at her port of delivery, for any indefinite length of time, at the pleaſure of the inſured. The fair conſtruction of this clauſe is, that the goods ſhall remain under the protection of the policy for a *reaſonable time*, till they can be conveniently landed, and no longer.

A ſhip is detained on the coaſt of *Africa* before ſhe can land her goods in the regular courſe of trade, the riſk continues, if there be no unneceſſary delay.

As, where an inſurance was made from *London* to *Port Endick*, on the coaſt of *Africa*, on the ſhip till moored at anchor 24 hours, and on goods "*till diſcharged and ſafely landed.*" The ſhip arrived on the coaſt on the 6th of *May*, and was captured by the *French* on the 4th of *June*. The trade is carried on by barter on board the veſſel, and the goods afterwards ſent on ſhore in boats, and

Parkinſon v. *Collier*, at N. P. *Park* 314.

(*a*) If that be a ſufficient ground to ſupport the caſe of *Sparrow* v. *Carruthers*, might not the like deciſion be ſupported on the ſame ground in the preſent caſe; for, from the time the goods were put into the plaintiff's lighter, the owners of the ſhip loſt all control over them, and were therefore diſcharged from all further concern in them. But, as Mr. Juſtice *Heath* very juſtly obſerves, 'the freight and inſurance are not commenſurate.' In truth, the inſurer, in ſuch caſe, continues liable after the owners of the ſhip are diſcharged.—(*b*) *Rucker* v. *Lond. Aſſur.* Sup. 166.

gums

gums brought back. In this caſe, the diſcharge of the cargo was not begun, the gums not having been brought down to the coaſt, but no delay was uſed.—In an action on the policy, it was contended on the part of the defendant, that by the cuſtom of this trade, the riſk on the goods, as well as on the ſhip, ended in 24 hours after her arrival on the coaſt, and that the riſk on the cargo, while on the coaſt, was protected by the homeward policy, which, in this inſtance, was at 15 guineas *per cent.* —Lord *Kenyon*, who tried the cauſe, refuſed the evidence both of the homeward policy, and of the ſuppoſed uſage, (which he had on a former occaſion admitted againſt his own opinion, and on which a new trial had been granted), to qualify the clear and unequivocal language of the policy, which covered the riſk *till the goods were landed.* He ſaid, that if, in landing, any unneceſſary delay had been uſed, that might amount to ſomething in the nature of a deviation; but that did not appear to be the caſe in the preſent inſtance.

Yet, if the cargo be ſold, without unloading, and the vendee contract for the freight of it to another port, the inſurer is diſcharged.

Yet, where a factor, after a ſhip's arrival at her port of diſcharge, ſells the cargo on board, without unloading, and the buyer of the goods contracts for the freight of them to ſome other port; but before the ſhip breaks ground, ſhe meets with an accident and is loſt.---In this caſe, the inſurers are diſcharged; for the property being changed, and freight contracted for *de novo*, it is the ſame as if the goods had been landed (*a*).

But the general rule may be controlled by the uſage of a particular trade.

But the following determination will ſhew, that where, by the uſage of a particular trade, it is cuſtomary to keep the goods on board the ſhip even beyond the time when they might be conveniently landed, on account of the ſhip's crew being neceſſarily employed in other buſineſs, the riſk will continue till the time when, *in the courſe of that trade*, they are uſually landed.

A ſhip and goods are inſured to the coaſt of *Labrador*. The goods are left a long time on board after the

An inſurance was made on two ſhips, and on goods on board, "From *Dartmouth* to *Waterford*, and from thence

(*a*) General treat. of trade, 78.

to the port or ports of diſcharge, on the coaſt of *Labrador*; on the *ſhips*, till moored at anchor 24 hours, and on the *goods*, *until the ſame ſhould be there diſcharged and ſafely landed.*"—The two ſhips arrived on the coaſt of *Labrador*; the one on the 22d of *June*, the other on the 14th of *July* 1778; and from the time of their arrival, the crews were employed in fiſhing, and had taken out none of their cargoes, except at leiſure hours, ſuch things as were immediately wanted. On the 13th of *Auguſt*, an *American* privateer entered the harbour, and took both veſſels.—In an action on the policy, to recover the value of the goods, the defence was, that there had been an unneceſſary delay in unloading the cargoes, and that the loſs was therefore imputable to the negligence of the inſured. On the other hand, the plaintiffs relied on the words of the policy, and the uſage of the trade, which they proved to have been for three years, to proceed in voyages of this ſort as the ſhips inſured had done. It appeared that the plaintiffs had the only warehouſes on the coaſt of *Labrador*, but that they were not ſufficient to hold the goods, if they had been landed; that, in chartering ſhips for this trade, it was uſual to ſtipulate that they ſhould have 60 days allowed for diſcharging; and that, in fact, they were ſometimes longer. That in the *Newfoundland* trade, it was uſual to keep their goods ſeveral months on board, and ſometimes even till they have part of their homeward cargo of fiſh on board; that the firſt object is to catch fiſh, and they unload only when they cannot fiſh; and that the old cargo being chiefly ſalt and proviſions, is gradually taken out as it is conſumed.—Upon this evidence the plaintiffs had a verdict.—The defendant moved for a new trial, on the ground, that the policy on the *ſhips*, having expreſſed 24 hours after their ſafe arrival as the duration of the riſk on them, no underwriter could ſuppoſe that he was to be liable for the *goods* for 50 or 60 days longer; that the fair conſtruction of the policy was, that the goods were to be protected a reaſonable time, and until they could be conveniently landed; that evidence of the uſage of

ſhip arrives at *Labrador*; but this being uſual in the fiſhing trade at that place, the riſk on the goods continues.

Noble v. *Kennoway*, *Doug.* 492.

of this particular trade ought not to have been admitted; and that a ſpecial clauſe might have been inſerted in the policy for protecting the ſhip and goods during her ſtay.---But the court held, that the inſurer was liable for this loſs.—Lord *Mansfield* ſaid;---"The trade of fiſhing on the banks of *Newfoundland*, eſpecially from the weſt of *England*, has been known and practiſed for many years. Since the treaty of *Paris*, a new trade has been opened to *Labrador*. The inſurance here is on the ſhips, and *the goods till landed*. The defendant ſays, the plaintiffs have been guilty of unreaſonable delay in landing them. That queſtion was to be tried by the jury, and could only be decided by knowing the uſual practice of the trade. Every underwriter is preſumed to be acquainted with the practice of the trade he inſures, whether recently eſtabliſhed or not. If he does not know it, he ought to inform himſelf. It is no matter if the uſage has only been for a year. This trade has exiſted, and has been conducted in the ſame manner for three years. It is well known that the fiſhery is the object of the voyage; and the ſame ſort of fiſhing is carried on in the ſame ſort of way at *Newfoundland*. The point is not analagous to a common law *cuſtom*; and the evidence of a uſage of a ſimilar trade at *Newfoundland* was admiſſible."

Every underwriter is preſumed to know the practice of the trade he inſures in, though recently eſtabliſhed.

The uſage of another ſimilar trade may be given in evidence, to ſhew the practice of a newly eſtabliſhed trade.

2. *Upon the Ship.*

UPON the ſhip, the riſk in ſome countries is made to commence from the time ſhe begins to take in her firſt goods or ballaſt, and to continue till after ſhe arrives at her place of deſtination, and is entirely diſcharged. In others, the riſk is made to end twenty-one days after the ſhip's arrival; or ſooner if ſhe be unloaded (*a*).—In *France*, if the time of the riſk on the ſhip be not regulated by the contract, it runs from the time ſhe ſets ſail, till her arrival at her port of deſtination, and till ſhe be there anchored and moored at the quay (*b*).

When the riſk on the ſhip begins and ends.

In *France*.

(*a*) 1 *Mag.* 47.—(*b*) Ord. of *Louis* XIV. tit. *Contrats à la groſſe*, art. 5. Vid. *Valin* on this art. *Pothier*, h. t. n. 63. *Emerig.* tom. 2. p. 14.

In

In *England*, the commencement of the risk on the ship varies in almost every case. In outward-bound voyages, it is generally made to commence from her beginning to load at her port of departure. In *England*.

Sometimes privateers on a cruise, ships engaged in the coasting trade, or in short voyages, are insured for a limited period of time; and, in such cases, the risk commences and ends with the term, wherever the ship may then happen to be.

If a ship be insured *from* the port of *London* to any other port, and before she breaks ground, an accident happen to her, the insurers are not answerable; for the risk does not commence till she sets sail on her departure from the port of *London*: But if the insurance be "*at and from*" the port of *London*, the insurers are liable for any accident that may happen to her, *from the time of subscribing the policy*. If an insurance be *from* a place, the risk does not commence till her departure from thence.

When a ship, expected to arrive at a certain place abroad, is insured "*at and from*" that place, or *from her arrival* there, the risk begins from the first moment of *her arrival at the place* specified; and the words "*first arrival*" are implied, and always understood in policies so worded. The risk in such cases continues there as long as the ship is preparing for the voyage insured: But if all thoughts of the voyage be laid aside, and the ship be suffered to lie there for a length of time, with the owner's privity, the insurer is not liable; for this would be to subject him to the whim and caprice of the owner, who might chuse to let the ship lie and rot there (*a*). In homeward voyages, where the policy is "*at and from*."

In some foreign countries, the risk on the ship is made to continue, as we have already observed, till she is entirely discharged. In others, it continues for twenty-one days after her arrival; unless she be sooner unloaded.—But in *English* policies it is usually made to continue only '*until the ship hath moored at anchor* 24 *hours in good safety*,' —*Magens* objects, and not without reason, that freight is not earned till the cargo is completely discharged, and Objections to the time allowed by *English* policies.

(*a*) Per Lord Ch. *Hardwicke*, in *Motteux* v. *Lond. Assur.* 1 *Atk.* 545. and in *Chitty* v. *Selwyn*, 2 *Atk.* 359. Vid. *Bird* v. *Appleton*, 8 T. R. 562, sup. 59.

as

as it is almoſt impoſſible for a ſhip to unload in ſo ſhort a time as 24 hours, the conſequence is, that the freight remains unprotected, from the expiration of the 24 hours till the ſhip is diſcharged. Therefore, ſays he, in bottomry bonds, and policies of inſurance, on ſhip and freight, there ſhould be a ſtipulation that the riſk ſhall not end till the expiration of a certain number of days after the ſhip's arrival (*a*).

The inſurer is liable for no loſs after the time.

Where the policy contains the uſual words '*until ſhe hath moored at anchor 24 hours in good ſafety*,' the following caſe will ſhew that the inſurer is anſwerable for no loſs after the expiration of that time.

A ſhip is moored on the outſide of a tier, there being no room for her within;—after the 24 hours ſhe is driven from her anchors.—The inſurer is not liable.

Angerſtein v. *Bell*, at N. P. *Park* 35.

A ſhip arrived in the *Thames* at the wharf where ſhe was to unload, on the 12th of *January*, and was laid on the outſide of the tier, there being no room for her on the inſide: Her ſails were unbent, her top-maſts ſtruck, three anchors out, and ſhe was laſhed to another ſhip, and ſo continued till the 19th, when ſeveral ſhips and a quantity of ice drove athwart her ſtern, forced her adrift, and ſhe was totally loſt.—In an action againſt an inſurer on this ſhip, Lord *Kenyon*, who tried the cauſe, was of opinion that ſhe was completely moored on the 12th of *January*; and as the accident did not happen till above 24 hours after that time, the inſurer was not liable for the loſs.

This holds though the cauſe of the loſs exiſted before the ſhip's arrival. The maſter of a ſhip having been guilty of ſmuggling during the voyage, the ſhip is ſeiſed on this account after ſhe arrives and has been moored 24 hours.—The inſurer is not liable, though the forfeiture attached the moment the offence was committed.

Lockyer v. *Offley*, 1 T. R. 252, inf. c. 13, § 5.

The following caſe ſhews that this rule holds, even where the loſs ariſes from a cauſe which exiſted antecedent to the time of the ſhip's being moored.

A ſhip was inſured from *Hamburgh* to *London*, and in the courſe of the voyage the maſter committed barratry by ſmuggling on his own account on the *Engliſh* coaſt; and for this ſmuggling, the ſhip, above three weeks after ſhe had arrived in ſafety at her moorings in the *Thames*, was ſeized by the revenue officers.—In this caſe it was determined that though, by the ſtat. 24 *G.* III. c. 47, and the other exciſe laws, the forfeiture attaches the moment the offence is committed, and the ſhip may be ſeized at any time afterwards; and though the barratry, in this caſe,

(*a*) Vid. 1 *Mag.* 23. 47. Vid. *Skin.* 243.

was

was committed *during* the voyage, yet the underwriters were not liable for this loſs.—Mr. Juſtice *Willes*, in delivering the opinion of the court, ſaid,—" Though the cuſtom-houſe officers might ſeize for the forfeiture within three years after the fact; and the Attorney General might file an information at any time while the ſhip was in being; is the inſurer during all this time to continue liable? Suppoſe the ſhip had gone ſeveral voyages afterwards; and ſuppoſe a partial loſs paid, and the underwriters name ſtruck out of the policy, ſhall an action be afterwards brought upon the policy? His accounts could never be ſettled, nor could he be finally diſcharged whilſt the ſhip was in exiſtence. Such a poſition would be monſtrous, and attended with infinite inconvenience. There muſt be ſome certain reaſonable limitation in point of time laid down by the court, when the inſurer ſhall be releaſed from his reſponſibility. If he be liable for a month, he may be liable for a year, and ſo on. And we all think that the law on inſurances would be left unſettled, and in much confuſion, if any other time were ſuggeſted than that preſcribed by the policy, namely, *the continuance of the voyage, and the ſhip's mooring 24 hours in ſafety.*"

So, where an inſurance was made on a ſhip for *ſix months;* and three days before the expiration of that time, ſhe received her death's wound; but, by pumping, ſhe was kept afloat till three days after the time; it was determined that the riſk was at an end before the loſs happened; and that therefore the inſurers were not liable. Upon the ſame principle, if an inſurance be made on a man's life *for a year*, and ſome ſhort time before the expiration of the term, he receive a mortal wound, of which he dies, *after the year*; the inſurer is not liable.

A ſhip is inſured for ſix months, during which time ſhe gets her death's wound, but ſurvives the ſix months:—The inſurer is not liable.

Meretony v. *Dunlop*, E. 23 *G.* III. in B. R. cited by Mr. Juſtice *Willes* in *Lockyer* v. *Offley*, 1 T. R. 260.

But before the riſk on the ſhip can be ſaid to be completely ended, ſhe muſt not only have been 24 hours moored at anchor in her port of deſtination, but ſhe muſt have been during that time *in good ſafety*, in the fulleſt

But if the ſhip from neceſſity be ſent from her moorings before the 24 hours are ended, the riſk continues.

fulleſt ſenſe of thoſe words. If, therefore, the ſhip be obliged to perform quarantine, this does not end the voyage. The voyage only ends when the ſhip is arrived at her port of deſtination, and is there moored 24 hours in good ſafety (*a*). And the following caſe will ſhew, that, if the ſhip, before the 24 hours are expired, be ordered to the proper place to perform quarantine, the riſk continues, though ſhe do not leave her moorings till long after the 24 hours are expired.

A ſhip, after being moored, but within the 24 hours, is ordered to the proper place to perform quarantine:—The riſk continues.

Waples v. *Eames*, 2 Str. 1248.

A ſhip was inſured, "At and from *Leghorn* to the "port of *London*, and till there moored 24 hours in good "ſafety."—She arrived on the 8th of *July* at *Freſh Wharf*, and moored, but was the ſame day ſerved with an order to go back to the *Hope*, to perform a fourteen days quarantine. The men upon this deſerted her, and the captain on the 12th applied to be excuſed going back, which petition was adjourned to the 28th, when he was ordered back. On the 30th ſhe went back, performed quarantine, and then ſent up for orders to air the goods, which he could not do till the 14 days were expired; but before the ſhip returned, ſhe was burnt on the 23d of *Auguſt*.—It was ruled (*b*) that though the ſhip was ſo long at her moorings, yet ſhe could not be ſaid to be there in *good ſafety*, which muſt mean the opportunity of unloading and diſcharging; whereas here ſhe was arreſted within the 24 hours, and the hands having deſerted, and government having taken time to conſider the petition, there was no default in the maſter or owners.

So, if the ſhip be ſeized at her port of delivery as prize, within the 24 hours.

The following caſe will ſhew that, upon the ſame principle, if the ſhip, on her arrival at her port of deſtination, be ſubject to ſeizure under an embargo and a declaration of repriſals, and ſhe be in fact ſeized, within the 24 hours, though ſhe be permitted afterwards to land her cargo, the inſurer is liable.

A ſhip arrives at her port of deſtination, and finds an embargo laid there, upon which ſhe is detained as prize:—The inſurers

A ſhip was inſured "from *Bilboa* to *Rouen*, and till 24 hours moored in ſafety there."—The ſhip arrived,

(*a*) Vid *Cleirac*, ch. 9, art. 15.—(*b*) At N. P. probably by *Lee*, C. J.

but

but an embargo had been laid on all *Engliſh* veſſels in that port. The captain went on ſhore the day he arrived, and the next day the embargo was laid on his ſhip. He was afterwards permitted to land his cargo, which he delivered to his conſignees, but the ſhip was detained as prize, and the captain and crew allowed ſubſiſtence, as priſoners of war, from the time of their arrival.—In an action on the policy, it was ruled by Lord *Kenyon*, that the ſhip was as much within the power of the enemy, as if a guard had been put on board the moment ſhe arrived. She could not, therefore, be ſaid to be 24 hours, or a minute, moored in *ſafety*, as far as relates to the inſured; for immediately on entering the port ſhe was, to all intents and purpoſes captured by the *French*.

are liable, though ſhe was permitted to land her cargo and deliver it to the conſignees.

Minnett v. *Anderſon*, at N. P. *Peake* 211.

When the voyage inſured is deſcribed in general terms, as "*from* A. *to* B.," without expreſſing how long after her arrival the inſurance is to continue; it has been holden that the riſk upon the ſhip continues till ſhe has been unloaded and diſcharged from the voyage (*a*).—And though it ſeems reaſonable that an inſurance on the ſhip, for the voyage from *A.* to *B.* generally, ſhould continue till the object of the voyage is accompliſhed, that is, till her cargo is landed; yet, in the following caſe it was determined that an inſurance upon a ſhip to *Jamaica generally* ends as ſoon as ſhe moors 24 hours in any port in the iſland, and does not continue till ſhe comes to her laſt port of delivery.

If the riſk on a ſhip be from *A.* to *B.* generally, it has been holden that it laſts till ſhe is unloaded and diſcharged.

Yet an inſurance to *Jamaica* generally, ends as ſoon as the ſhip has anchored 24 hours at any port there, though her cargo is to be delivered in different places.

A ſhip was inſured "From *London* to *Jamaica*" *generally*; and, by a ſubſequent policy, ſhe was alſo inſured, "*At and from Jamaica* to *London*."—The ſhip, having touched for ſome days at one port of *Jamaica*, was loſt in coaſting the iſland, but before ſhe had delivered all her outward bound cargo at the other ports of the iſland.—The ſhip was what is called a *general* ſhip; that is, ſhe was advertized at *Lloyd's* coffee houſe,

Camden v. *Cowley*, 1 *Bl.* 417 and 418.

(*a*) E. Anon. *Skin.* 243.

as bound to the iſland generally; and, by the courſe of trade, to touch at the ſeveral ports of the iſland there to deliver ſome goods and take in others.—In an action on the *homeward policy*, in order to ſhew where the homeward riſk commenced, it was neceſſary to ſhew at what time the outward riſk determined; and after an examination of merchants as to the cuſtom, it was decided by a ſpecial jury that the underwriters on the homeward policy were liable for the loſs, being of opinion that the outward riſk ended when the ſhip had moored twenty-four hours in any port of the iſland; and did not continue till ſhe came to the laſt port of delivery.—Upon a motion for a new trial, Lord *Mansfield* ſaid that the inclination of his opinion was the contrary way. But as the cauſe had been thoroughly tried, and no new light could be thrown on it, he was againſt granting a new trial. The other judges concurred, and Mr. Juſtice *Wilmot* ſaid he was of opinion that the verdict was right, the ſhip having arrived *at Jamaica*, the firſt port ſhe came to trade in.

General inſurance on ſhip and goods to *Jamaica*. The ſhip, after diſcharging part of her cargo at one port, is chartered for another voyage, in which ſhe is to deliver the reſt at another port of the iſland.—The riſk ended on both ſhip and goods, at the firſt port.

Leighv. Mather, at N. P. *Eſp. Pop.* 412, *Park* 38

So, where an inſurance was made on the ſhip *Paliſer* and goods on board, "At and from *Georgia* to "*Jamaica*, and till moored 24 hours in ſafety."—The ſhip arrived at *Montego Bay*, where ſhe moored and remained nearly a month, and the agent of the inſured ſold, and *delivered*, the greateſt part of her cargo to merchants there. The captain then chartered the ſhip to proceed from thence to *St. Anne*'s, and there take in a cargo for *London*; and it was verbally agreed that the remainder of the cargo, which was lumber, ſhould be carried *as ballaſt* to *St. Anne*'s. Accordingly the ſhip, after taking in ſome ſuſtick, proceeded toward *St. Anne*'s, but was loſt in her paſſage thither.—In an action on the policy, it was urged for the plaintiff, that the policy being in general terms, "to *Jamaica*," it meant to include all the ports in that iſland, at which any part of the cargo was to be delivered; and therefore, upon ſuch an inſurance, the *ſhip* may go from port to port; but at all events, the *goods* were protected by the policy *till they were all diſcharged*

and

and ſafely landed.—But Lord *Kenyon*, who tried the cauſe, held clearly, that the riſk on the *ſhip* ceaſed on her being moored 24 hours in the firſt port of the iſland, *for the purpoſe of unloading*:—He ſaid that, when a ſhip is inſured to any particular port of delivery, if by ſtreſs of weather ſhe be forced into a different port, and there diſcharge part of her cargo, ſhe is nevertheleſs protected by the policy till ſhe arrives at her port of delivery. But it appearing in evidence that *Montego Bay* was the original deſtination of the *cargo*, and that its not being wholly delivered there, was only prevented by the new agreement, he held that nothing could be recovered for the loſs of *goods*. For a ſhip, inſured to *Jamaica generally*, cannot be permitted to go from port to port, round the whole iſland, for the purpoſe of unloading, eſpecially where, as in this caſe, the ſame perſon is owner of both ſhip and goods.

In *France* it was uſual to inſure to the *French Weſt India* iſlands generally; and, in ſuch caſe, the riſk on *goods* continued till they were landed at their reſpective places of deſtination; and on the *ſhip*, till ſhe had diſcharged her cargo at the laſt of thoſe places.—But where the ſhip had diſcharged all but a ſmall part of her cargo, amounting to about one *per cent.* on the whole, and had begun to take in her homeward cargo, the riſk on the ſhip was conſidered as at an end, and the inſurer diſcharged (*a*).

But they hold, that ſo long as any conſiderable part of the cargo remained on board, the riſk continues, though part of the homeward cargo be put on board.

As where an inſurance was made on a ſhip and cargo from *Bourdeaux to the French Weſt India Iſlands; with liberty to touch, ſtay, and trade at ſuch ports or places as the captain ſhould think proper* (*b*).—The ſhip arrived at

(*a*) *Emerig.* tom. 1, p. 72.—(*b*) This, I conceive, is the meaning of the words, 'Touchant et faiſant échelle aux endroits 'que bon ſemblera au capitaine.' Vid. *Emerigon*'s explanation of this clauſe in *French* policies, vol. 2, p. 30.

Jaquemel in *St. Domingo*, and there diſpoſed of part of her cargo, and took on board 26 bales of cotton, and after a ſtay of five months, ſhe ſailed for *St. Louis*, to continue the ſale of her outward cargo, and to procure the remainder of her homeward cargo. On her paſſage thither ſhe was chaſed by three *Engliſh* privateers into a bay, where the captain landed as much of the cargo as he could, and then ſet fire to the ſhip, to prevent her falling into the hands of the enemy.—In a ſuit to recover for this loſs, the inſurers contended that as the inſured, before the loſs happened, had began to take on board their homeward cargo, this put an end to the outward voyage, and diſcharged them. On the part of the inſured it was inſiſted that the 26 bales of cotton were too inconſiderable to change the character of the voyage from outward to homeward; that there was nothing in the contract to prevent the replacing a part of the cargo, by goods of the place where the ſhip touches, and that the riſk on the ſhip continues till the outward cargo is all, or nearly all, landed.—The inſurers were condemned to pay the loſs. This ſentence was reverſed; but, upon appeal to the parliament of *Bourdeaux*, the original ſentence was affirmed, and the inſured recovered (*a*).

It is obſerved by *Emerigon* on this caſe, that as the cargo was not all diſpoſed of at *Jaquemel*, the ſhip's departure for *St. Louis* ought to be looked upon as a continuance of the voyage, and upon that principle the final deciſion was right: But that it would have been otherwiſe, if, by the ſale of all, or nearly all the cargo at *Jaquemel*, the outward voyage had been ended.

The riſk on the furniture of the ſhip may continue even when put on ſhore.

In general, the riſk on the rigging, tackle, furniture, and proviſions of the ſhip inſured, continues no longer than they are attached to, or remain on board the ſhip. But the following caſe is an authority to ſhew that where it is neceſſary to put theſe articles on ſhore during a repair, and this is the uſual practice in ſuch caſes, the riſk continues on them while on ſhore, and

(*a*) Vid. *Emerig.* tom. 2, p. 73.

if

if they are loſt or damaged by any of the perils mentioned in the policy, the inſured is liable.

The rigging and tackle of a ſhip are put on ſhore during a repair in the uſual courſe of the voyage, and are burnt by accident.—This is a loſs within the policy.

Pelly v. *Roy. Ex. Aſſur.* 1 *Bur.* 341.

An inſurance was made on the ſhip *Onſlow*, "At and "from *London* to any ports or places beyond the *Cape* "*of Good Hope*, and back to *London*, free from average "under 10 *per cent.*, upon the body, tackle, &c. of the "ſhip: Beginning the adventure from the date of the "policy, and to continue till the ſhip ſhall have arrived "as above, and there anchored 24 hours in good ſafety." The ſhip arrived in the river *Canton*, in *China*, where ſhe was to ſtay to clean and refit, and for other purpoſes. Upon her arrival there, all her rigging and furniture were, by the Captain's orders, taken out of her, and put into a ſtorehouſe called a *Bank Saul*, built for that purpoſe on a ſand bank, in the river, near *Bank Saul* Iſland, in order to be there repaired, and preſerved till the ſhip ſhould be heeled, cleaned, and refitted. Soon after, a fire broke out in the *Bank Saul* belonging to a *Swediſh* ſhip, which communicated to that belonging to the *Onſlow*, and conſumed it, together with her rigging and furniture. It appeared to be the univerſal uſage for many years, for *European* ſhips, when they arrive near this *Bank Saul Iſland*, to unrig and depoſit their rigging and furniture in a *Bank Saul*, in the manner above-mentioned: And this is for the benefit of all perſons concerned in the ſafety of the ſhip. The ſhip having been again rigged, and put into the beſt condition the place would permit, arrived in the *Thames*.—Upon this caſe it was inſiſted on the part of the defendant, that though the inſurer was liable for all loſſes, *during the courſe of the voyage*, yet that this liability was confined to loſſes *at ſea* only; whereas this was a loſs on ſhore. But the court determined, after great conſideration, that the loſs on the *Bank Saul* was a loſs within the words, intent, and meaning of the policy.—Lord *Mansfield*, in delivering the opinion of the court, ſaid,—"The tackle, apparel, and furniture, of the ſhip, were inſured expreſsly from fire during the voyage, and until her return to *London*. Theſe being deſtroyed by fire, during the voyage, and before her return, is a loſs within the general words of

If a loſs be within the *general words* of the policy, it is incumbent on the inſurer to ſhew that it aroſe from a peril not inſured againſt.

the policy; and it was therefore incumbent on the defendants to ſhew, from the manner in which it happened, that it aroſe from a peril againſt which they did not inſure. But the inſurer, in eſtimating the premium, muſt have conſidered the uſual courſe of the voyage, and deſcribing the voyage in the policy is an expreſs reference to the uſual manner of making it, as much as if every circumſtance were mentioned. The only objection was, that the loſs happened on *land*, and not in the ſhip, or on the water. To this the obvious anſwer is, that neither the words, nor the intent, of the policy make ſuch diſtinction."

Deſcribing the voyage in the policies is an expreſs reference to all the circumſtances attending it.

So, in a ſimilar caſe, where the ſhip's *proviſions* were landed and put into a *Bank Saul*, and there deſtroyed by an accidental fire, the queſtion was, whether thoſe proviſions were covered by the policy; but it was admitted that, if they were, it was to be conſidered in the ſame light as if the accident had happened *on board the ſhip*.

Such a loſs is to be conſidered in the ſame light as if it had happened on board the ſhip.

Brough v. *Whitmore*, 4 T. R. 206.

Every underwriter is preſumed to be fully converſant in the uſual courſe of the trade on which he becomes an inſurer; and therefore, if he does not know it, he ought to inform himſelf becauſe he will be bound by the uſage of ſuch trade, as much as if it were particularly inſerted in the policy. This rule has been already exemplified in the caſe of *Noble* v. *Kinnoway (a)*, and it is particularly to be attended to by underwriters upon *Eaſt India* voyages, the policies on which are ſo unlimited, as to time and place, that they include the country voyage there, and all riſks that may be run in conſequence of any new agreement made in *India* to prolong the time mentioned in the charter party; nor is it neceſſary to inform the underwriters of ſuch new agreement; as that, and all other neceſſary information on the ſubject may readily be had at the *India Houſe*. This will appear by the following deciſions on inſurances of this ſort.

Every underwriter is preſumed to be acquainted with the courſe of the trade on which he becomes an inſurer.

An inſurance made on a ſhip, "At and from "*Bengal*, to any ports or places in the *Eaſt-Indies*, *China*,

An inſurance upon an *India* voyage, includes the riſk of the

(a) Sup. 171.

"*Perſia*

" *Perſia*, or elſewhere beyond the *Cape of Good Hope*, for- " wards and backwards, and during her ſtay at each " place, until her arrival at *London*."—In an action on this policy, tried before Lord *Mansfield*, it appeared in evidence that the charter party was in the uſual printed form, containing a clauſe impowering the company's ſervants in *India* to detain the ſhip for any time they pleaſed, not exceeding a year from the time to which ſhe was chartered. That the ſhip ſailed on the 25th of *March* 1762, arrived at *Bombay* the 19th of *September*; left *Bombay* the 4th of *November*; arrived at *Calcutta* the 5th of *March* 1763.—On the 28th the preſident and council entered into a new agreement with the captain, reciting that the charter-party would expire on the 11th of *February* 1764, but that it was expedient to detain the ſhip in *India*; and the captain, by that agreement, lets the ſhip for a year from that day.—In *July* 1763, the ſhip arrived a ſecond time at *Bombay*; ſailed for *Bengal* in *December*; arrived there early in 1764; ſailed again for *Bombay* the 19th of *March*, and on the 21ſt was loſt.—On the 3d of *April* 1764 the owner received a letter from the captain dated the 14th of *April* 1763, with a copy of the new agreement, which was publicly read in a coffee-houſe. The next day ſome inſurances were made by the owner, and on the 17th of *July*, other inſurances were made: All which were made after this letter was publickly read.—It was further proved that it was very common in this trade to detain ſhips for a year by a new agreement, which was very beneficial to the owners; to which uſage the words of the policy are adapted, being without limitation of time or place, and without any reference to the firſt voyage; That all this might have been learned at the *India Houſe*: But at the time of the underwriting, no mention was made, or queſtion aſked, when the ſhip ſailed, or when ſhe arrived, or whether ſhe was continued for a year according to the proviſo in the charter party; and none of the underwriters deſired *to be off*, after they knew of the new agreement to prolong the ſhip's ſtay.—The defence ſet up

country voyage by the uſage of the trade.

Salvador v. *Hopkins*, 3 *Burr.* 1707.

by the underwriters was, that the policy was void, becauſe, at the time of the underwriting, they were not expreſsly told of the new agreement to detain the ſhip beyond the time provided by the charter party.—But the plaintiff obtained a verdict.—Upon a motion for a new trial, the court determined that, under all the circumſtances, the plaintiff was entitled to recover.—The reaſons which governed the court in this deciſion were;—That the underwriters are preſumed to know the courſe of the *Eaſt-India* trade, the terms of the charter party, and the deſtination of the *India* ſhips, (which are under the direction of the company and not of their owners): That the charter party is a printed form of very long ſtanding: That, beſides the liberty thereby given, to prolong the ſhip's ſtay for a year, it is very common, by a new agreement, to detain her a year longer; for no ſhip comes home in ballaſt, and the longer a ſhip is kept, the more beneficial to the owners. That the words of the policy are adapted to this uſage, being without limitation of time or place, and without any reference to the firſt voyage particularly mentioned in the charter party: That the terms of the policy preciſely deſcribe the riſk in its utmoſt latitude, and neceſſarily extend to every prolongation of ſtay, and every country voyage: That the uſage of the *India* trade, and the courſe of the voyages in it, were notorious to inſurers, who muſt be ſuppoſed ſufficiently conuſant of them, and the obligation of the policy is taken from the uſage, and the words of the charter-party, which refer to that uſage, in the ſame manner as if it were expreſsly inſerted in the policy; whereas if every perſon inſured ſhould be obliged to ſtate to the inſurer all the grounds of his expectations, as to the ſhips continuance in *India*, or her returning to *England*, it might produce great litigation and confuſion in caſes ariſing upon theſe policies: Beſides, it would be contradictory to the policy, to ſay that the underwriter did not inſure for a country voyage.

If in a policy on an *India* voyage, there be liberty

A ſimilar queſtion aroſe upon a policy on goods, ſpecie, and effects, on board an *Eaſt-Indiaman*, on her voyage

"From

"From *London* to *Madras* and *China*; with liberty to "*touch, ſtay, and trade* at any ports or places whatſoever." —When the ſhip arrived at *Madras*, ſhe was too late to go to *China* that year; upon which ſhe was employed by the council there to go from *Madras* to *Bengal*, to fetch rice; which voyage ſhe performed once, and proceeded on the ſame voyage a ſecond time, in which ſhe was loſt.—It was objected, that theſe intermediate voyages were not inſured under the policy; for the words "*to* "*touch, ſtay, and trade at any ports or places whatſoever,*" only meant to give a licenſe to ſtay at ſuch places as it ſhould be neceſſary to ſtop at *in the courſe of the voyage.* The plaintiff, however, obtained a verdict.—Upon a motion for a new trial, the court determined, that theſe intermediate voyages were a riſk within the policy; and that the inſured were therefore intitled to recover.—Lord *Mansfield* ſaid,—"To underſtand this policy you muſt refer to the courſe of the trade to which it relates. By the uſual courſe of the trade, if an *India* ſhip come to *Madras* too late in the ſeaſon to proceed to *China*, the council employs her in an intermediate voyage. It is for the benefit of all concerned that ſhe ſhould be ſo employed; the underwriters are perfectly well acquainted with this uſage, and are bound to take notice of it. Before the year 1780, it was uſual to inſure both the outward and homeward voyages in one policy, and then the words "*backwards and forwards*" were inſerted. Since then, they have divided it, and inſure each voyage in a diſtinct policy. The policy in queſtion differs from others, becauſe it contains not only the uſual permiſſion to *touch and ſtay* at any ports or places, but alſo to *trade* there; which are words ſo large that they ſeem ſufficient to include the intermediate voyage. It would narrow the conſtruction very much indeed, to ſay that the policy relates to thoſe places only, at which they ſhall ſtop in the voyage. The words employed certainly take in the intermediate voyage; and the uſage of trade confirms this conſtruction."

"*to touch, ſtay* "*and trade* at "any ports or "places," this covers the riſk even of a *ſecond* country voyage.

Gregory v. *Chriſtie*, B. R. Tr. 29 *G.* III. MS. S. C. *Park* 41, ſup. 94.

The

The following caſe ſhews that, even where the liberty is only '*to touch and ſtay*,' yet, by the uſage of the trade, intermediate voyages are covered by the inſurance.

In a like policy, the liberty was only to *touch and ſtay* at any port, &c. in the voyage:—By the uſage of the trade, this covered the riſk on the intermediate voyages.

A ſhip was inſured, "At and from *London* to *Madras* "and *Bengal*, beginning the riſk upon the ſaid ſhip, at "*London*, and ſo to continue till the arrival of the ſaid "ſhip at *Madras* and *Bengal*, with liberty *to touch and* "*ſtay at any port or place* in the voyage."—The ſhip arrived at *Madras*, where, by an order of council, ſhe was unloaded, and ſent for rice to *Viſagipatnam*, and her voyage to *Bengal* was poſtponed. She was afterwards ſent to *Bengal* in ballaſt, and was taken in her paſſage.—In an action on the policy, Lord *Mansfield*, at the trial thought that the words of the policy would not admit of ſuch a latitude of conſtruction, as to take in the intermediate voyage, the words being much narrower than thoſe in the laſt caſe; and the plaintiff was nonſuited. But this nonſuit was afterwards ſet aſide, the court being clearly of opinion that the riſk continued during the intermediate voyages.—Lord *Mansfield* ſaid,—"This being a policy on the ſhip on an *India* voyage, and the uſage, as to the intermediate voyages, being notorious to all parties, the contract muſt be conſidered as referring to it. This uſage is that, when the ſhips arrive at *Madras*, the council may ſend them elſewhere."

Farquarſon v. *Hunter*, B. R. Hil. 25 *G.* III, MS. S. C. *Park.* 50.

But though, by the well known uſage of any particular trade carried on by this country, a voyage is ſometimes covered by the policy, which is not within the expreſs words of it; yet, the general rule is, that a liberty '*to* '*touch at any ports or places*' means only places in the uſual courſe of the voyage; and this general rule muſt be conſidered as applicable to voyages undertaken by the ſhips of foreign nations, unleſs the uſage of the particular trade in which they are engaged be made known to *Britiſh* underwriters, who cannot be preſumed to be conuſant of ſuch uſage.

But the general rule is, that a liberty to touch and ſtay at any ports and places, means only places in the uſual courſe of the voyage.

Thus:—An inſurance was made, "At and from "*Port L'Orient* to *Pondicherry*, *Madras*, and *China*, and "at and from thence back to the ſhip's port or ports of

An inſurance of a *French* ſhip upon a voyage to *Pondicherry* and *China*, with liberty to touch

" of diſcharge in *France*, with liberty to touch in the *out-*
" *ward or homeward bound voyage*, at the Iſles of *France*,
" *Bourbon*, and at all or any other place or places where-
" ſoever." There was alſo a clauſe in the policy, " That
" the ſhip, *in this voyage*, might proceed to, and touch
" and ſtay at, any ports or places, as well on this ſide,
" as on the other ſide of the *Cape of Good Hope*, without
" its being deemed a deviation."—The ſhip arrived at *Pondicherry*, and, after remaining there a month, ſailed for *Bengal* inſtead of going to *China*. Having wintered, and undergone a repair there, ſhe returned to *Pondicherry*. Both in going and returning ſhe touched and took in goods at, or lay off, ſeveral places; and ſo prolonged her voyage to and from *Bengal* much beyond the uſual time. Having taken in her homeward cargo at *Pondicherry*, ſhe proceeded on her voyage back to *L'Orient*, but was taken by an *Engliſh* privateer. In an action on this policy, one queſtion was, whether the voyage to *Bengal* was inſured by the policy, under the general liberty to touch and ſtay *at any ports or places?*—Upon this point Lord *Mansfield*, who tried the cauſe, held clearly that thoſe general words were, by the expreſſions " out-
" ward and homeward-bound voyages," and " in this
" voyage," qualified and reſtrained ſo as to mean only places, *in the uſual courſe of the voyage* to and from the places mentioned in the policy (*a*).

and ſtay at ports and places, &c. will not cover a voyage to *Bengal*.—A liberty to touch and ſtay at any ports and places, means ports and places in the uſual courſe of the voyage.

Lavabre v. *Wilſon*, Doug. 271.

A liberty to *touch and ſtay* at any ports or places does not authoriſe the inſured to *trade* at any of thoſe places. Thus:—A ſhip was inſured from *Whitehaven* to *St. Michael's*, and from thence to her port or ports of diſcharge in the *Channel*, " with liberty to touch and ſtay
" at any port or ports on her paſſage out."—The ſhip by ſtreſs of weather put into the port of *Dublin*, where ſhe continued three weeks, and there broke bulk and ſold a quantity of coals with which ſhe was partly freighted.—Upon this coming out in evidence, Lord *Kenyon* ſaid, that the plaintiff could not recover under this policy, becauſe the liberty to touch and ſtay at any port, could

A liberty to *touch and ſtay* does not authoriſe the inſured to break bulk and trade.

Stitt v. *Wardell*, at N. P. Eſp. Rep. 610.

(*a*) Vid. this caſe cited more at large, inf. ch. 12, § 1.

never

never be extended to give the inſured a liberty of *trading* at ſuch port; for that would be to make the underwriters inſure a voyage not in their contemplation.

The riſk may be properly commenced, though under circumſtances unforeſeen at the time of the contract.

If the voyage deſcribed in the policy has really been commenced, though at a time, and under circumſtances very different from thoſe which were in the contemplation of the parties at the time when the policy was effected; yet, if there be no fraud, miſrepreſentation, or concealment on the part of the inſured, this ſhall be a good commencement of the riſk.

A ſhip is inſured from *A.* to *B.* being repreſented as a ſpecific part of a voyage from *B.* to *C.* from thence to *A.* and back to *B.* The ſhip having ſailed to *C.* is unavoidably obliged to return to *B.* from whence ſhe ſails to *A.* and is captured on her voyage back from thence to *B.* —The inſurer is liable for this loſs, though the original voyage, of which the voyage inſured was a part, was not performed. And the ſailing from *A.* for *B.* was a good commencement of the voyage inſured.

Thus:—The ſhip *Timandra* having ſailed from *Liſbon* on a voyage to *Madeira*, and from thence to *Saffi*, on the coaſt of *Africa*, and back from thence to *Liſbon*, the plaintiff directed his broker to make three inſurances, viz. one on three-fourths of the ſhip, for the round voyage, one on three-fourths of the freight, on the voyage from *Liſbon* to *Madeira*, and one, (which was the inſurance in queſtion), on three-fourths of the freight "from *Saffi* to *Liſbon*."—The two former were effected without any difficulty; but the broker was not able to get the third underwritten at the ſame time, on account of the diſtant period at which the riſk was to commence: However, on a repreſentation ſome time afterwards, that he had received intelligence of the ſhip's arrival at *Madeira*, and that ſhe was about to proceed on her voyage immediately, this alſo was effected.—An action being brought on this policy for a loſs by capture, the defendant paid the premium into court, inſiſting that the voyage inſured had never been commenced.—Upon the trial of the cauſe, it appeared that when the ſhip arrived at *Madeira*, all the crew except two, being alarmed by reports of ſome *Mooriſh* cruiſers being off *Saffi*, and their having captured and ill-treated a *Dane* and an *American*, quitted the ſhip, and refuſed to return to her, unleſs the captain would promiſe to ſail immediately back for *Liſbon*. Under theſe circumſtances the captain carried the ſhip back to *Liſbon*; but on his arrival there, the charterers inſiſted on his proceeding directly from thence to *Saffi*, which he accordingly did, and was captured on his return from

Driſcol v. *Paſſmore*, 1. *Pul. & Paſ.* 200.

from *Saffi* to *Liſbon*. It was in evidence that the difference of ſeaſon, ariſing from this delay, did not vary the riſk.—The jury found a verdict for the plaintiff, and upon a motion for a new trial, it was contended on the part of the defendant, 1ſt, That where a voyage is inſured from *A.* to *B.*, it muſt appear either that the ſhip is at *A.* at the time of the inſurance, or how and when ſhe is to arrive there; otherwiſe it would be an indefinite inſurance on the firſt voyage which the ſhip ſhould make from *A.* to *B.* with the ſame maſter, and the other requiſites of the policy: That if it be ſtated whether the ſhip be at *A.* or when ſhe will be there, this becomes an ingredient in the riſk inſured; and this ſeemed to have been the underſtanding of the underwriters, when they refuſed to inſure till they were informed of the ſhip's arrival at *Madeira*; and conſequently, as the ſhip, inſtead of proceeding to *Saffi*, had returned to *Liſbon*, the voyage inſured was abandoned; or rather, as the previous part was abandoned, the voyage inſured never commenced. 2dly, That this was not an inſurance on any voyage which the ſhip might make from *Saffi* to *Liſbon*; but on a voyage from *Saffi* to *Liſbon*, being part of a voyage, already commenced, from *Liſbon* to *Madeira*, from thence to *Saffii* and from *Saffi* back to *Liſbon*; and that the repreſentation of this to the underwriters was the ſame in this caſe as a warranty, in as much as there was a ſubſtantial deviation from it. That the voyage undertaken at the inſtance of the charterer was a new voyage; and that no recommencement of what had once been abanbandoned, could make the underwriter liable.—The court determined, however, that the plaintiff was intitled to recover.—Lord C. J. *Eyre* ſaid,—"It is admitted, that this is a new caſe, and there are no authorities on the ſubject. It has been argued on the part of the defendant, that the voyage inſured was the third branch of a voyage ſpecifically deſcribed in the policy; but I take the voyage inſured to have been a voyage from *Saffi* to *Liſbon* only. Now, that the voyage deſcribed did literally commence, there can be no doubt, and I know of

no way in which that voyage could be reſtricted in point of commencement or connexion with any other voyage, but by repreſentation or warranty. If a man be aſked to underwrite a voyage from *Saffi* to *Liſbon*, he naturally enquires what this voyage is, and at what time it will commence, that he may judge of the riſk. He will expect a repreſentation, and that repreſentation ought to be true. Here the repreſentation was, that the ſhip was bound from *Liſbon* to *Madeira*, from thence to *Saffi*, and from *Saffi* to *Liſbon*. That repreſentation was true at the time it was made, and the underwriter was to form his own calculation of the time when the ſhip would arrive at *Saffi*. If the inſurance be made on a repreſentation which is true at the time, it would be difficult to ſtate a caſe, where ſubſequent events, not happening through miſconduct, and not totally diſappointing the voyage, would diſcharge the underwriter. In this caſe the underwriter formed his judgment of the riſk, knowing that all was executory, and that an alteration might ariſe that might increaſe the riſk. He underwrote upon the repreſentation made to him. A circumſtance occurred under which the captain was at a loſs how to act. He reſolved to go back to *Liſbon*, and there the charterer required him to fulfil his engagement. He ſailed accordingly, and arrived at *Saffi*; and in the courſe of his voyage home was captured. Then, why are not the underwriters liable? They were literally bound to inſure a voyage from *Saffi* to *Liſbon*; tied up, indeed, as far as a repreſentation of the projected voyage, executory in its nature, and true at the time, could tie it up.—The voyage from *Saffi* to *Liſbon* might have been performed with as much eaſe after the circuitous voyage had taken place, unleſs a *Spaniſh* war had broken out, as in the direct courſe originally performed, from which the ſhip was diverted, by circumſtances for which no one was to blame."

Though the ſhip, through neceſſity, change the order of the places at which ſhe is to touch,

Though the ſhip, in this caſe, being under the neceſſity of changing the order of the places to which ſhe was inſured, yet as ſhe did not abandon the original voyage, but

but in fact ſailed from *Liſbon* to *Saffi*, in order to perform her engagement with the charterers, the riſk continued, and the underwriters on the *whole voyage* remained liable.

yet if ſhe do not abandon the original voyage, the riſk continues.

Therefore, in an action on the policy, on the ſame ſhip *for the round voyage*, from *Liſbon* to *Madeira*, from thence to *Saffi* and back to *Liſbon*, the ſame facts appeared upon the trial as in the former caſe, with the addition of a letter, dated the 18th of *Auguſt*, at *Liſbon*, from the plaintiff after her return from *Madeira*, to his broker in *London*, containing this paſſage,—"Should the "merchant here who chartered the veſſel, inſiſt on her "proceeding to *Saffi* to fulfil the charter, I want to know "if it be agreeable to the underwriters that the veſſel "may proceed to complete her voyage, as by recent ac- "counts the riſk is not ſo great. I expect your imme- "diate anſwer reſpecting their determination on this "buſineſs. I hope they will be ſatisfied that the return "of the veſſel to this port, is much more in favour of "them than of me, or of any other perſon concerned. "By the next packet that ſails from hence, I ſhall be "able to inform you whether ſhe is to proceed to *Saffi* "or not; but the opinion of the underwriters one way "or the other is neceſſary." The broker, in anſwer to this letter, gave it as *his* opinion, that the policy on the round voyage was at an end, and informed the plaintiff that he had effected a new policy on the voyage from *Saffi* to *Liſbon*.—The jury found for the plaintiff.—The defendant moved for a new trial, contending, that although the deviation made by returning to *Liſbon* might poſſibly be juſtified by neceſſity, ſtill it appeared by the plaintiff's letter, that the original object of the voyage had not been kept conſtantly in view; for it long depended on the will of the charterer, whether the veſſel ſhould proceed or not; and the plaintiff himſelf was manifeſtly deſirous of abandoning the voyage.—The court determined that the verdict was right, being of opinion, that the plaintiff, although he acted with great prudence and circumſpection, had never abandoned the original voyage, but

The ſhip is inſured on the *round voyage*. mentioned in the laſt caſe. The captain, on his arrival at *B*. writes to his broker to know whether the underwriters will ſtill conſider themſelves liable, if the charterer ſhould inſiſt on his proceeding to *A*. and is anſwered by the broker that in *his* opinion the policy is at an end. At the inſtance of the charterer, the ſhip proceeds to *A* and on her return from thence is captured:—The inſurer is liable, the deviation being juſtified by neceſſity, and the original voyage never having been abandoned.

Driſcol v. *Bovil*, 1 *Pul.* & *Boſ.* 313.

but conſidered himſelf liable to continue it, ſhould the charterer inſiſt on it.

3. *Upon Freight.*

Upon *freight*, the riſk does not commence till the goods are put on board.

In an inſurance upon *freight*, the riſk generally begins from the time the goods are put on board. If an accident happen to the ſhip before any goods are put on board, which prevents her from ſailing, the inſured cannot recover for the loſs of freight, which the ſhip *might* have earned if the accident had not happened.

An inſurance is on freight, and a cargo is ready to be put on board, but the ſhip is loſt while preparing for the voyage:—The inſurer *is* not liable, the riſk never having commenced.

Tonge v. *Watts*, at N. P. 2 *Str.* 1252.

Thus:—An inſurance was made "on ſhip and "freight, at and from *Jamaica* to *Briſtol*."—A cargo was ready to be put on board; but while the ſhip was careening for the voyage, a ſudden tempeſt aroſe, and ſhe was loſt.—In an action on the policy, the defendant paid the loſs *upon the ſhip* into court. But the plaintiff inſiſted on the loſs of the *freight* the ſhip *would have earned*, if the accident had not happened.—But Lord C. J. *Lee* ruled, that as the goods were not actually on board, ſo as to make the plaintiffs right of freight *commence*, he could not be allowed it.

But if part be ſhipped, the inſured, upon a valued policy, may recover for the whole freight.

Part is ſhipped, and the reſt ready to be ſhipped; but the ſhip is loſt: On a valued policy the inſured ſhall recover for the whole freight.

Montgomery v. *Egginton*, 3 T. R. 362.

But, in the following caſe it appears, that if part of the cargo be put on board, and the reſt be ready to be ſhipped, the inſured may recover for the whole freight, upon a valued policy.

An inſurance was made on freight, valued at 1500 l. The ſhip was driven from her moorings and loſt, when only freight to the amount of 500 l. was on board, though goods to the amount of the reſt of the freight were, at the time, lying on the quay, ready to be ſhipped.—In an action on this policy, Lord *Kenyon*, who tried the cauſe, left it to the jury to conſider, whether this was a mere colourable inſurance, and a gaming policy, or a *bonâ fide* tranſaction: If the latter, he was of opinion, that the inſured was intitled to recover for the whole value in the policy. The jury accordingly found the whole ſum. The defendant's counſel obtained a rule for a new trial, which he afterwards abandoned, the court being ſtrongly of opinion againſt him.

But

But though the commencement of the riſk on freight is, in general, from the taking of the goods on board; yet, the following caſe will ſhew, that where the ſhip is to ſail to a diſtant place to take in her cargo, the riſk commences on the freight from the time of her ſailing for that place.

If the ſhip be loſt on her way to her port of loading, the inſurer is liable for the whole freight.

A ſhip was chartered, "To depart from the *Thames* "and proceed to *Teneriffe*, and there to receive on "board from the freighters, 500 pipes of wine, to "be delivered in the *Weſt Indies*."—A valued policy was effected on half the freight, "At and from *London* to "*Teneriffe*, and from thence to any of the *Weſt India* "Iſlands, *Jamaica* excepted; and at and from thence to "the *Bay of Honduras*."—The ſhip was taken on her voyage to *Teneriffe*.—In an action on this policy, it was determined, that, as the charter party was an entire contract, and as the ſhip's departure from the *Thames* was an inception of that contract, an inchoate right to freight commenced upon her departure, which was an inſurable intereſt. And as the loſs of the ſhip neceſſarily induced the loſs of the freight, the inſured had a right to recover for that loſs upon this policy, which was an inſurance on the freight. That this caſe was diſtinguiſhable from that of *Tonge* v. *Watts* (*a*), where the inception of the riſk would have been the taking of the goods on board; and that it was as great an intereſt as the profits expected to ariſe from a cargo of molaſſes, which, in the caſe of *Grant* v. *Parkinſon* (*b*), was held to be an inſurable intereſt.

A ſhip ſails from *London* to *Teneriffe*, to take in a cargo for the *Weſt Indies*, and is loſt in that voyage:—The inſurers on freight are liable.

Thompſon v. *Taylor*, 6 T. R. 478.

Sect. 6.

Whether the Riſk may be changed.

IF, after the inſurance is effected, any thing be done by the inſured to alter the nature of the riſk, this muſt be done with the conſent of the inſurers, otherwiſe it will avoid the contract: As if, after a policy is effected on a merchant ſhip, letters of marque be put on board, and from a mere private trader, ſhe is changed into a

Changing the nature of the riſk after the policy is effected, determines the contract.

(*a*) 2 *Str.* 1251, ſup. 192.—(*b*) Sup. 111.

ſhip of war, with power not only to defend herſelf, but alſo to cruiſe and take prizes: This is ſuch an alteration of the condition of the ſhip, that the riſk muſt be materially changed from that which the underwriter took upon himſelf, and conſequently the contract is thereby determined.

A ſhip, inſured as a private trader, afterwards takes letters of marque, without the conſent of the underwriters:—This diſcharges the underwriters, though no uſe be made of the letters of marque.

Deniſon v. Modigliani, 5 T. R. 580.

As where a ſhip and cargo were inſured on a voyage "from *Liverpool* to *Oporto*:"—The ſhip ſailed but was driven back by contrary winds. She was then detained ſome time by an embargo, and before this was taken off, a war with *France* having broke out, the inſured were deſirous of putting guns on boaad, and taking out letters of marque for her: But fearing that this might vacate the policy, they aſked permiſſion of the underwriters, who agreed to their putting guns on board; but peremptorily refuſed to permit her to take letters of marque. Notwithſtanding this refuſal, ſhe was furniſhed with letters of marque, and after waiting ſome time for them, ſailed on her voyage, and was taken by a *French* privateer.—In an action on the policy, it was inſiſted on the part of the underwriters, that the ſhip, having ſailed with letters of marque againſt their conſent, the riſk was altered, and the policy thereby vacated. —The inſured, on the other hand, ſaid that the letters of marque were not intended to be uſed in the *voyage inſured*, but only in the *voyage home*; and that, in fact, the ſhip had not deviated in any reſpect.—The jury, being ſatisfied of this, found a verdict for the plaintiff.—But the court upon motion, ſet this verdict aſide, and determined, that a ſhip, inſured as a private trader, had no right to carry letters of marque, without the conſent of the underwriters: For they afford a ſtrong temptation to the captain to deviate in queſt of prize, and eſſentially alter the condition of the ſhip from that of a mere private trader, which materially varies the nature of the riſk, and conſequently diſcharges the underwriters.

Obſervations on this caſe.

The only ground upon which this deciſion can be at all ſuſtained, is, that the letters of marque being on board afforded a temptation to the captain to deviate from the voyage inſured in queſt of prize. It is now a ſettled point, that an *intention* to deviate, not carried into effect, does

does not avoid the policy. Still leſs, I ſhould conceive, ought a *tempation* to deviate, which may or may not produce even an *intention* to deviate, to affect the policy. It was found by the jury, in this caſe, that the letters of marque were taken on board, not for the purpoſe of being uſed in the outward voyage, but only in the homeward, which was not the voyage inſured; and that, in fact, the ſhip did not deviate.—In the following caſe, the ſame court determined, that the having letters of marque on board, but without the proper certificate of clearance, without which the captain was unable to make any *legal* uſe of them, did not vacate the policy. This deciſion, it may be preſumed, proceeded on the idea that the having theſe defective letters of marque on board afforded no temptation to the captain to deviate in queſt of prize; and yet it will be ſeen, that the plaintiff recovered in that caſe, for a loſs by barratry, in conſequence of the captain's having cruiſed in queſt of prize, under colour of the defective letters of marque. The diſtinction ſeems to be, between the letters of marque which afford a legal, and thoſe which afford an illegal, temptation to cruiſe. If we were permitted, however, to judge by the event, we might conclude that thoſe of the latter deſcription afforded the ſtrongeſt temptation.

The caſe alluded to was an inſurance made on goods, "From the *Bahama Iſlands* to *Liverpool*," on board a ſhip which had been chartered for a trading voyage from *Liverpool* to the *Bahamas*, and back.—The ſhip, about the middle of *May* 1793, having completed her lading, and having taken in guns and ammunition, for the purpoſe of defence, was ready to ſail, but wanted ſeamen. The inſured could procure none to enter, on account of a notion prevailing among them, that the enemy had threatened to treat as pirates the crews of every veſſel which made any reſiſtance, unleſs ſhe had letters of marque, and they knew that this ſhip had guns on board for the purpoſe of defence, but no letters of marque. The time preſſing much for the departure of the veſſel, the inſured, in order to quiet the apprehenſions of the ſeamen, and to induce

Letters of marque were taken out, but without the proper certificate, and only to entice ſeamen to enter, without any intention of cruiſing:—This did not vary the riſk, ſo as to avoid the policy, even though the captain, againſt his inſtructions, cruiſed and took prizes.

Moſt v. *Byrom*, 6 T. R. 379.

induce them to enter, procured letters of marque, *but without any intention to make uſe of them for the purpoſe of cruiſing or making repriſals.* No certificate of clearance was taken out, in purſuance of the ſtat. 33 *G.* III. c. 66, § 15, without which the letters of marque are declared void; and the captain ſubjected to a penalty for departing without it; and it was a part of the written inſtructions to the captain, before he ſailed, to proceed to *Liverpool* with all expedition, agreeably to the charter-party, and no mention was made of the letters of marque. A few days after the veſſel ſailed, the captain intimated an intention to cruiſe for prizes, to which ſome of the crew objected, as not being within the ſcope of their engagement; the majority, however, agreed to it, and they ſoon fell in with an *American*, whom they plundered, and afterwards releaſed. They then cruiſed for ſome days longer, out of the courſe of the voyage, and captured a veſſel of the enemy, which the captain ſent into *Bermudas*, and followed there himſelf, where he libelled his prize in the court of admiralty, in the name of himſelf and his owner; and ſhortly after, during his ſtay there, his ſhip was driven aſhore in a ſtorm, and the cargo loſt. He directed that no mention ſhould be made in the log-book of his cruiſing for prize.—In an action on the policy, the jury found for the inſured, as for a loſs by the *barratry of the maſter.*—The court was moved to ſet this verdict aſide; 1ſt, becauſe this was not barratry, in as much as the act of the captain was done with a view to benefit, not to prejudice his owner; 2dly, becauſe the taking of letters of marque, without the knowledge or conſent of the underwriters, varied the riſk, and avoided the policy; and for this, the above caſe of *Deniſon* v. *Modigliani* was relied on as a clear authority in point. And it was argued, that though the inſured inſtructed the captain not to uſe the letters of marque; yet it was plain that they did vary the riſk, becauſe in fact they tempted him to do what he did. That it was true the ſame objection had been overruled in *Deniſon* v. *Modigliani;* but the preſent was a ſtronger caſe, becauſe the

captain did give way to temptation, and made uſe of the power which the inſured put into his hands; whereas, in that caſe, the captain did not act under the letters of marque, but the bare poſſeſſion of them was held ſufficient to vacate the policy. But, at any rate, the policy was avoided before any barratrous act committed, by the ſingle act of the captain's going out of his way to ſtop the *American* ſhip.—But the court determined that the inſured were intitled to recover on the ground of barratry. That the ſtopping and plundering the *American* ſhip was of itſelf an act of barratry in the maſter, independent of his taking the prize, being contrary to his duty to his owners, and to their prejudice; becauſe they had ſtipulated, by the charter-party, that the ſhip ſhould ſail directly to *Liverpool*, and were therefore liable for any damage that might happen in conſequence of that deviation. And though the captain might conceive that what he did was for the benefit of the owners, yet if he acted contrary to his duty to them, it was barratry.—Lord *Kenyon* ſaid, that the principles on which the caſe of *Deniſon* v. *Modigliani* was decided, were new and went to the extreme verge; yet, that the preſent caſe was diſtinguiſhable from that, where there were *legal* letters of marque to enable the captain to take prizes; but here the letters of marque were not obtained for the purpoſe of enabling the ſhip to cruiſe, but to procure ſeamen; and when they were procured, they could have no legal effect, and then it was the ſame as if no letters of marque had been on board.

CHAP. VII.

Of the Policy.

HAVING, in the foregoing chapters, ſhewn who may be parties to this contract, what may be the ſubject matter of it, upon what intereſt, and againſt what riſks, it may be made, we will now proceed to ſhew how, and in what form, the contract itſelf ſhall be made.

This contract is uſually compounded of the common policy, with certain ſtipulations or warranties, which are occaſionally inſerted in it, purſuant to the agreement of the parties, and of extrinſic repreſentations.

For the ſake of perſpicuity, we will examine each of theſe in a ſeparate chapter; beginning with the policy. Under this head, we will conſider,

1. The nature and properties of the policy;
2. How, and by whom, it may be effected;
3. The form and requiſites of it;
4. In what caſes it may be altered or corrected.

Sect. 1.

Of the Nature and different Sorts of Policies.

A policy what.

The policy is a written inſtrument, by which the contract of inſurance is effected and reduced into form.—The term policy of inſurance, or *aſſurance*, as it is ſometimes called, is derived from the *Italian*, *polizza di aſſecurazione*, or *di ſecuranza*, or *di ſecurta*, and in that language ſignifies a *note* or *bill of ſecurity*, or indemnity.

It is ſigned only by the inſurers.

As the premium, which is the conſideration of the promiſe made by the inſurer, is paid, or ſuppoſed to be paid, at the time the policy is ſubſcribed, the contract contains nothing in nature of a counter-promiſe, to be performed by the inſured. In general, therefore, it contains

tains only the contract on the part of the insurers, and is signed only by them.

Policies, with reference to the *reality of the interest* of the insured, are distinguished into *interest*, and *wager* policies. With reference to the *amount* of the interest, they are distinguished into *open* and *valued.* Different sorts of policies.

An *interest policy* is where the insured has a real, substantial, assignable, interest in the thing insured; in which case only it is a contract of indemnity. Interest policy.

A *wager policy* is a pretended insurance, founded on an ideal risk, where the insured has no interest in the thing insured, and can therefore sustain no loss by the happening of any of the misfortunes insured against. Insurances of this sort are usually expressed by the words, "*interest or no interest*," or, "*without further proof of interest* than the policy," or, "*without benefit of salvage to the insurer.*" Wager policy.

An *open policy* is where the amount of the interest of the insured is not fixed by the policy; but is left to be ascertained by the insured, in case a loss should happen. Open policy.

A *valued policy* is where a value has been set on the ship or goods insured, and that value inserted in the policy in nature of liquidated damages, to save the necessity of proving it, in case of a total loss: For, by allowing the value to be thus inserted in the policy, the insurer agrees that it shall be taken as there stated.—This value is, or ought to be, the real value of the ship, or the prime cost of the goods, at the time of effecting the policy (*a*). Valued policy.

There may be many cases, however, in which an insured may have an interest in the thing insured, but the amount of which, it may be difficult or impossible for him to ascertain at the time when it is necessary to insure: As where *returns* are expected from abroad, the exact value, and even the nature of which are uncertain; so, in the case of a *prize*, where the real value of it can only be ascertained when it is brought into port and sold; and

(*a*) 2 *Bur.* 1171.

in every inſtance where the owners have been prevented from receiving regular or ſatisfactory advices. In theſe and ſimilar caſes, the inſured muſt put a value upon the things inſured in the beſt manner he can, according to his means of judging of it; and in ſuch caſes it ſeems proper, and is become cuſtomary, to inſert a clauſe of valuation in the policy, which ſpecifies a given ſum as the value of the intereſt of the inſured.—Thus: "*In caſe of loſs the "ſaid ſhip is valued at* 2000 *l. and the ſaid goods at* 5000 *l:*" —Or, it eſtimates the value as equal to the ſums ſubſcribed. Thus:—"*The ſaid ſhip, goods, &c. valued at the "ſum inſured.*"

The va'ue in ſuch policy ſhould be only the prime coſt.

The only effect of the valuation is, that it fixes the amount of the intereſt in the ſame manner as if the inſurer were to admit it at a trial; and for every purpoſe it muſt be taken, that the value was fixed ſo as that the inſured might have an indemnity only, and no more.—If it be undervalued, the merchant himſelf runs the riſk of the deficiency. If it be much over-valued, it muſt be with a bad view; either to a fraudulent loſs, or to game contrary to the ſtat. 19 *G.* II. c. 37 (*a*).

Upon a valued policy, the inſured needs only to prove *ſome* intereſt, the amount being admitted.

The value in the policy, being always conſidered as the fair amount of the prime coſt, the inſured needs only to prove *ſome intereſt*, to take it out of the ſtatute, becauſe the inſurer has admitted the amount; and if more were required, the agreed valuation would ſignify nothing (*b*). —And though it is ſaid, in the caſe of *Harman* v. *Vanhatton* (*c*), that the law allows a man, having *ſome* intereſt in a ſhip or cargo, to inſure more, or *five times as much*, becauſe a merchant cannot tell how much, or how

(*a*) Per Lord *Mansfield* in *Lewis* v. *Rucker*, 2 *Bur.* 1171. —(*b*) Per Lord *Mansfield*, ib.—*Magens*, who ſeems to have written his eſſay on inſurances before the ſtat. 19 *G.* II., c. 37. though it was publiſhed after, ſays that in the caſe of a valued policy, the inſured has nothing to prove, "*ſave that the goods valued were put on board.*"—Vid. 1 *Mag.* 28, 35. If this was the practice, while inſurances without intereſt were ſuppoſed to be legal, how much more neceſſary to be obſerved now that they are declared by ſtatute to be illegal, and are known to be highly detrimental to commerce.—(*c*) Sup. 101.

little,

little, his factor may have in readineſs to lade on board his ſhip: Yet it is not ſaid, that in caſe of loſs, the inſured might recover more than the amount of the real intereſt. And in a ſubſequent caſe, in the year 1716, the Lord Chancellor ordered the inſured in a valued policy on goods, to diſcover what goods he had on board.

Le Pypre v. *Farr*, 2 *Vern.* 716.

But though a valued policy is diſtinguiſhable from a wager policy in this, that the former is founded on real intereſt, the amount of which is agreed by the policy, in the latter the inſured has avowedly no intereſt at all: Yet, it muſt be owned that a valued policy evidently partakes of the nature both of a policy on intereſt and of a wager. On the one hand it ſuppoſes a *bonâ fide* intereſt in the inſured; on the other, this intereſt is not always expected to be exactly commenſurate with the amount of the inſurer's obligation. There is a real intereſt it is true; but this frequently falls ſhort of the nominal value in the policy; and it too often happens that wager policies are effected under colour of a ſmall intereſt, and in the form of valued policies, and the beneficial effects of the ſtat. 19 *G.* II. c. 37, are thereby defeated.

Diſtinction between a valued policy and a wager.

The value in the policy, therefore, ought only to be conſidered as *primâ facie* evidence of the amount of the intereſt of the inſured; for though this value is admitted by the inſurer, yet, as he admits it upon the mere repreſentation of the inſured, if he find that this was fallacious, that it was factitious, and only a cover for a wager, it cannot be ſuppoſed that he is ſo far concluded by his admiſſion, as not to be at liberty to diſpute the value, and ſhew by evidence that it was a mere evaſion of the act.

The value in the policy is only *prima facie* evidence of the intereſt, and may be diſputed.

By the law of *France*, the value in the policy ſhall be taken to be true as againſt the inſurer, till he prove the contrary (*a*). *Valin*, indeed, ſays that an inſurer cannot be permitted to alledge fraud in the value ſpecified in the policy, ſo as to be let in to ſhew a new valuation, without

How this is regulated by the *French* law.

(*a*) *Valin* ſur art. 64, p. 136, *Pothier*, h. t. n. 151, 159, *Emerig.* tom. 1, p. 271, 2.

ſhewing

ſhewing that the value in the policy is at leaſt *one fourth too high* (*a*); and for this he might have cited *Le Guidon*, ch. 2, art. 13. *Pothier*, on the contrary, holds that the value is only to be taken as juſt, till the inſurer impeaches it; and that the inſurer may be let in to prove the valuation to be too high, even where there is an expreſs clauſe in the policy to preclude ſuch inquiry, ſuch clauſes being always held to be illegal (*b*), the rule of the civil law being, *Conventio, ne dolus præſtetur rata non eſt* (*c*).—If the exception to the valuation prevail, it either reduces the ſum inſured to the value of the goods, or, if fraud appear in the valuation, avoids the policy, and bars the demand of the inſured: That is, if the inſured *knew* that the goods were over-valued; or even where there is a *preſumption* of fraud, ariſing from the concealment of a former inſurance (*d*). For by the ordinance of the marine (*e*), the inſurance ſhall be preſumed fraudulent, if the inſured do not declare all he has inſured; or even if he demand payment beyond the value of the effects inſured. For the moment the inſured would turn a loſs to his own advantage, and ſeek to recover more than he put in riſk, with whatever good faith he might have made the original valuation, he is guilty of fraud (*f*). But however the exceſs may have originated, it is incumbent on him to ſhew that it proceeded from ſome error on his part, or on the part of his agents. *Pothier* and *Valin* ſay, however, that when the tranſaction admits of doubt, the judges, to mitigate the ſeverity of the law, are more inclined to impute the fault to error than to fraud; and therefore, unleſs fraud is made evident, a juſtification is readily received (*g*).

In *England*, if a valued policy be meant as an indemnity, the amount of the valuation will not be very ſcrupulouſly inquired into.

In *England*, as we have already ſeen, we are not quite ſo rigid. Where a valued policy is *bonâ fide* meant as an *indemnity*, the courts will not enquire very minutely whether the valuation be very near the true intereſt of the

(*a*) Vid. *Valin* ſur art. 64, h. t.—(*b*) *Pothier*, h. t. n. 148, 156.—(*c*) *Dig.* lib. 13, tit. 6, n. 17.—(*d*) *Pothier*, h. t. n. 157.—(*e*) Ord. de la mar. h. t. art. 53, 54, 55.—(*f*) *Emerig.* vol. 1, p. 271, 272.—(*g*) *Valin* ſur art. 23, p. 67, *Pothier*, h. t. n. 78.

inſured. A ſmall exceſs ought not to be regarded. Conſidering the uncertainty of every valuation, a ſcrupulous exactneſs, in this point, would only occaſion endleſs litigation. But, on the other hand, if the intereſt proved be a mere cover for a wager, every court muſt pronounce the policy to be void, within the meaning of the ſtatute (*a*).

But if it be only a cover for a wager, it will be void.

It is only in the caſe of a total loſs, that there is any material difference between an open and a valued policy. In the former, the value muſt be proved, in the latter it is admitted. But in the caſe of a partial loſs, the like inquiry into the true amount of ſuch loſs is to be made, whether the policy be of the one ſort or of the other. For if this were not to be done in the caſe of a valued policy, the conſequence would be, either that every partial loſs muſt be conſidered as a total one, or elſe that nothing ſhould be deemed a loſs at all, unleſs it were a total loſs (*b*),

The only difference between an open and a valued policy is in the caſe of a total loſs.

Sect. 2.

How, and by whom the Policy may be effected.

IT ſeldom happens that there is any direct communication between the inſured and the inſurer. The buſineſs of negociating inſurances with the underwriters, and of getting policies effected, is uſually tranſacted by brokers who make this branch of buſineſs their profeſſion. Theſe inſurance brokers, from the importance of their employment, ought to be, and indeed generally are, perſons of great reſpectability and honour, in whom unlimited confidence may be ſafely repoſed. To the broker the merchant looks for the regularity of the contract, and a proper ſelection of reſponſible underwriters. To him alſo the underwriters look for a fair and candid diſcloſure of all material circumſtances affecting the riſk, and for the payment of their premiums.

Inſurance brokers.

Nature of their dealings.

There is uſually an open account between each broker and every underwriter with whom he has much deal-

Account between brokers and underwriters.

(*a*) Vid. ſup. 103.—(*b*) Vid. 2 *Bur.* 1171.

ing.

ing. In this account the broker makes himſelf debtor to the underwriter for all premiums, and takes credit for all loſſes to which the underwriter is liable and which the broker is authorized to receive. Indeed it is generally underſtood, that by the uſage of trade in *London*, the underwriters give credit only to the broker for their premiums, and can reſort only to him for payment; and that he alone, and not the underwriters, can recover the premiums from the inſured. This point, however, has never been ſettled by any judicial determination. Perhaps it would be for the intereſt of all parties if this rule were fully eſtabliſhed, and conſtantly adhered to.

Though the premium is a debt due from the *broker*, yet a loſs is only due to the *principal*.

But though the underwriter thus looks to the broker for his premium, and though the broker in his account with the underwriter, takes credit for the loſſes and returns of premium, which he is authoriſed to receive from the underwriter; yet, ſuch loſſes are not to be looked upon as a *debt* from the underwriter to the broker.

Wilſon and others aſſignees v. *Creighton* and others, B. R. M. 23 *G.* III. MS.

Therefore, where the aſſignees of a bankrupt who had been a policy broker, brought an action againſt the defendants, who were agents or factors to various correſpondents abroad, and the defendants claimed, by way of ſet off, the balance of an account between them and the bankrupts, in which they debeted themſelves for various premiums of inſurance, made on behalf of their correſpondents; and took credit for all loſſes and returns of premiums upon theſe inſurances. The defendants had no commiſſion *del credere*, and none of their correſpondents were inſolvent; but to all their correſpondents, except one, they were in advance on account of inſurances.—Upon this caſe, the court held that though credit for the premiums muſt be given to the broker, becauſe the underwriters know nothing of the principals; yet that they could not ſet off the loſſes or returns of premium due to the principals, and which *they* only could ſue for, againſt a debt due from the defendants to the bankrupt.

Grove v. *Dubois*, B. R. Hil. 26 *G.* III. MS.

In a ſubſequent caſe, where the action was brought by the aſſignees of an underwriter againſt the factor, it was determined, that the defendant might ſet off loſſes upon policies ſubſcribed by the bankrupt, and due to the

defendant's correſpondents: But there the defendant had a commiſſion *del credere*, which Lord *Mansfield* ſaid made him liable to his corrrſpondents for loſſes, without firſt bringing an action on the policy againſt the underwriter.

When the merchant happens to reſide at a diſtance from the place where he means to be inſured, the policy is uſually effected by the mediation of his agent or correſpondent there, who, if he be not himſelf a broker, employs one, and gives him all neceſſary inſtructions, with which he has been furniſhed for getting the inſurance effected.

Authority of an agent.

To make a man an agent, in ſuch caſe, he muſt either have expreſs directions from the principal to cauſe the inſurance to be made, or elſe it muſt be a duty ariſing from the nature of his correſpondence with the principal. And no general authority which he may have in relation to a ſhip or goods, will make him an agent for the purpoſe of inſuring on behalf of the parties intereſted. Therefore a ſhip's huſband, regularly appointed by deed executed by all the owners, with power to advance, lend, &c. to make all payments, and to retain all claims, &c. has no right to make inſurance for all, or any of the part owners, without a general direction from all, or a particular direction from each (*a*).

The office of ſhip's huſband does not neceſſarily give him authority to inſure.

Three caſes in which an agent is bound to comply with an order to inſure.

Though one man cannot, in general, compel another againſt his conſent, to become his agent to procure an inſurance to be effected for him: Yet there are three caſes, wherein an order to inſure muſt be complied with.—

1ſt. Where a merchant abroad has effects in the hands of his agent or correſpondent here, he has a right to expect that the agent will comply with an order to inſure; becauſe he is entitled to diſpoſe of the money in his agents hands in what manner he pleaſes.—2dly. Where the merchant abroad has no effects in the hands of his correſpondent here; but the courſe of dealing between them has been ſuch, that the one has been uſed to ſend orders for inſurance, and the other to execute them; the former has a right to expect that his orders for inſurance

1ſt. Where he has effects of his principal in his hands.

2dly. Where he has been in the practice of making inſurances, and has given no notice to diſcontinue.

(*a*) R. *French* v. *Backhouſe*, 5 *Bur.* 2727.

ſhall

shall still be obeyed, unless the latter give him notice to discontinue that course of dealing.—3dly. Where the merchant abroad sends bills of lading to his correspondent here, with an order to insure, as the implied condition on which he is to accept the bills of lading; and the correspondent accepts the bills of lading, he must obey the order; for it is one entire transaction, and the acceptance of the bills of lading amounts to an implied agreement to perform the condition (*a*).

3dly. When he accepts bills of lading sent him on condition to insure.

To the office of agent or broker, great responsibility attaches; and in the execution of it, therefore, it is the duty of each to conduct himself with the greatest fidelity, punctuality, and circumspection. For, in this, as in all other cases, where a man, either by an express or implied undertaking, engages to do an act for another, and he either wholly neglects to do it, or does it improperly or unskilfully, an action on the case will lie against him to recover a satisfaction for the loss or damage resulting from his negligence, carelessness, or want of skill.

The agent, as well as the broker, is answerable to his employer for negligence or unskilfulness.

Therefore, if a merchant here accept an order from his correspondent abroad to cause an insurance to be made, but limit the broker to too small a premium, in consequence of which no insurance can be effected; he is liable to make good the loss to his correspondent (*b*). —For though it is his duty to get the insurance done at as low a premium as possible, yet he has no right so to limit the premium, as to prevent the insurance from being effected.

Even if the agent prevent an insurance from being effected, by limiting the broker to too small a premium, he is answerable.

Even if a person voluntarily undertake to procure an insurance to be effected, without the expectation of any remuneration for his trouble, though, perhaps, he is not bound to perform his undertaking; yet, in fact if he do proceed to execute it, he will be answerable for

Even a *voluntary* agent is liable, if he take any step in the business.

(*a*) Per *Buller*, J. in *Wallace* v. *Tellfair*, at N. P. 2 T. R. 188 in notis, and in *Smith* v. *Lascelles*, 2 T. R. 188, *Ashurst* and *Grose*, Js. concurring.—(*b*) Per *Buller*, J. in *Wallace* v. *Tellfair*, at N. P. 2 T. R. 183 in notis. Vid. *Delaney* v. *Stodart*, 1 T. R. 22.

any

any negligence or unſkilfulneſs in the conduct of it.—This will be exemplified in the following caſe.

A. gratuitouſly offers to get a fire policy renewed and transferred to *B.* but omits to get the aſſignment made: *A.* is liable for any loſs occaſioned to *B.* by this omiſſion.

In an action on the caſe for negligence, it was ſtated in the declaration, that the plaintiff, in *Auguſt* 1792, purchaſed certain premiſſes from the defendant, who had then a ſubſiſting policy from the *Phœnix* fire office, from *December* 1791 to *December* 1792: That the defendant undertook to get this policy renewed on account of the plaintiff, and regularly transferred to him: That he did, in fact, renew the policy and paid 16*l.* which he charged to the plaintiff, but neglected to get it transferred from himſelf to the plaintiff, by the proper indorſement at the fire office; in conſequence of which, the plaintiff, who ſuſtained a loſs by fire, was precluded from recovering on the policy.—On the trial, it was admitted on the part of the plaintiff, that there was no conſideration moving from the plaintiff to the defendant for his undertaking, but that the defendant had undertaken to get the policy renewed and transferred gratuitouſly.—On this being admitted, Lord *Kenyon*, who tried the cauſe, expreſſed a doubt whether any action could be maintained on ſuch an undertaking.—To remove this doubt, the plaintiffs counſel cited *Wallace* v. *Tellfair*, a caſe ſimilar to the preſent, in which Mr. Juſtice *Buller* had ruled at *niſi prius*,—"That though there be no conſideration for one party's undertaking to procure an inſurance to be effected for another; yet, that where a party voluntarily undertakes to do it, and proceeds to carry his undertaking into effect, by getting a policy underwritten, but does it ſo negligently or unſkilfully that the inſured can derive no benefit from it; in that caſe he is liable to an action."—Lord *Kenyon* acquieſced in this diſtinction, and ſuffered the cauſe to proceed: But the plaintiff failing in the proof of any promiſe by defendant to procure the inſurance to be renewed and transferred as ſtated in the declaration, he was nonſuited.

Wilkinſon v. *Coverdale*, *Eſp.* Rep. 74.

A policy broker employs another policy broker, but omits to give him all the inſtructions he is furniſhed with:

So, where the defendant, who was a policy broker in *London*, employed another broker in *London*, by the directions of the plaintiff who reſided at *Liverpool*, to effect a particular policy, but omitted, through inadvertance, to deliver

He ſhall anſwer for the loſs occaſioned by his omiſſion, though he derived no profit from the tranſaction.

Seller v. *Work*, at N. P. after Hil. 1801. MS.

deliver to him, with his other inſtructions, a letter from the plaintiff, containing material information reſpecting the time of the ſhips ſailing, and which ought to have been ſhewn to the underwriters.—A loſs having happened, the underwriters refuſed to pay on account of this concealment; and upon this ground the plaintiff, in an action on the policy againſt one of the underwriters, was nonſuited. The plaintiff brought the preſent action againſt the defendant for the damage occaſioned by his negligence in not delivering the letter to the broker who effected the inſurance.—It was objected at the trial that as the defendant himſelf had no ſort of remuneration for his trouble, an action could only be maintained againſt him upon the ground of *wilful negligence*.—But Lord *Eldon*, who tried the cauſe, held clearly, that the defendant having taken upon himſelf to employ the other broker, he was bound to communicate to him all the inſtructions he had received, and having omitted to do this, he was liable for all the conſequences.—In ſettling the amount of the damages in this caſe, the plaintiff inſiſted on including the coſts of the action brought upon the policy.—But Lord *Eldon* ſaid that there was no neceſſity to bring that action in order to entitle the plaintiff to recover in the preſent caſe; and as it did not appear that the action upon the policy was brought by the deſire, or with the concurrence, of the preſent defendant, he ought not to be charged with the coſts of it.

The defendant in ſuch action is not liable for the coſts of an action brought on the policy, unleſs it was brought by his deſire.

The agent muſt alſo act fairly by the inſurer.

Any fraud or concealment by him will avoid the policy, even though the inſured be innocent of it.

But it is not only the duty of the agent, in tranſacting the buſineſs of inſurances, to conduct himſelf with fidelity and punctuality towards his employer; he is alſo bound to obſerve the ſtricteſt veracity and candour towards the inſurer. Indeed he cannot be a faithful agent to the one, without dealing honourably with the other; for any concealment, miſrepreſentation, or other fraud committed by the agent will have the ſame effect in avoiding the policy, as if it were committed by the inſured himſelf, even though it be done without his privity or knowledge (*a*), or ignorantly (*b*), or even con-

(*a*) *R. Stewart* v. *Dunlop*, poſt. c. 10. § 1.—(*b*) *R. Fitzherbert* v. *Mather*, 1 T. R. 12, poſt. c. 9, § 1.

trary

trary to his directions. For it is a maxim of law that, if one of two innocent perſons muſt ſuffer by the fraud or negligence of a third, the loſs ſhall fall on him who truſted the third perſon.

In an action againſt an agent or broker for negligence or unſkilfulneſs in effecting an inſurance, the plaintiff is entitled to recover to the ſame amount as he might have recovered againſt the underwriters had the policy been properly effected. But he can only recover what, *in point of law*, he might have recovered on the policy; and not what the indulgence or liberality of the underwriters might probably have induced them to pay (*a*).—And, in ſuch an action, the agent may avail himſelf of every defence, ſuch as fraud, deviation, non-compliance with warranties, &c., which the underwriters might have ſet up in an action on the policy (*b*).

In ſuch action the plaintiff ſhall recover the ſame as in an action againſt the inſurer.

But where the agent uſes due diligence, and does what is uſual to get the inſurance effected, that is ſufficient: As if he ſend to *Lloyd*'s, and the underwriters refuſe to take the riſk, becauſe the ſhip was not regiſtered; and upon this he ſend to *Newcaſtle*, and gets it done there: He has done all that could be required of him; and no action will lie againſt him for not inſuring in *London*, eſpecially if the owner has adopted his acts (*c*).

But if the agent act in the uſual manner, it will be ſufficient.

There are many reaſons why an agent or broker ought not to be an inſurer. He becomes too much intereſted to ſettle with fairneſs the rate of premium, the amount of partial loſſes, &c. And though he ſhould not, himſelf, create any unneceſſary delay or obſtacle to the payment of a loſs, he will not be over anxious to remove the doubts of others. Beſides, he ought not, by underwriting the policy, to deprive the parties of his unbiaſſed teſtimony, in caſe of diſpute. For though there may be no legal objection to his *competency*, as a witneſs for the other underwriters (*d*), it is impoſſible that his *credit* ſhould be alto-

An agent or broker ought not to be an underwriter.

(*a*) R. *Webſter* v. *De Taſtet*; 7 T. R. 157, ſup. 74.—(*b*) Per Lord *Kenyon*, in *Wilkinſon* v. *Coverdale*, at N. P., after M. 34 G. III. *Park* 303.—(*c*) Per *Buller* J. at N. P. in *Smith* v. *Cologan*, 2 T. R. 188 *in notis*.—(*d*) Vid *Bent* v. *Baker*, T. R. *H. Bl.*

gether free from ſuſpicion. The principal, in ſhort, can never place any reliance in one who makes himſelf an adverſe party, and who is, at the ſame time, above all others, in a capacity to abuſe his confidence.

The inſured may maintain trover for the policy, and recover in like manner as againſt the underwriters.

The policy, when effected, becomes the property of the inſured, in whoſe hands ſoever it may happen to be; ſubject, however, to any fair or equitable *lien* which the holder may have upon it: And if it be wrongfully withheld, the inſured may maintain an action of trover; and in ſuch action he ſhall prove his loſs, and recover in like manner as in an action againſt the inſurer.

If an agent pretend that he has effected a policy, trover will lie againſt him for it, though none has been effected.

If an agent or broker, meaning to appropriate the premium to himſelf, and take the chance of a ſafe arrival, repreſent to his employer that an inſurance has been effected agreeably to his inſtructions, a practice but too prevalent, the principal may maintain trover for the policy againſt the agent or broker; and, upon proof of a loſs, he ſhall recover to the ſame amount as he would have been entitled to recover againſt the underwriters, had a policy been effected. This will appear by the following caſe.

A broker informs his employer that he has effected a policy for him; —In trover for the policy, The plaintiff ſhall prove his loſs as in an action againſt the inſurer; and the broker ſhall not be permitted to ſay that no ſuch policy exiſts.

Harding v. *Carter*, and another, at N. P. Eaſt. Vac. 1781, *Park* 4.

An action of trover was brought againſt the defendants, who were brokers, for a policy of inſurance; and it appeared on the trial, that they had written to the plaintiff, the maſter of the veſſel, that they had got two policies effected; the one on account of his clothes and wages, the other on account of the owners; and that the underwriter was Mr. *Newnham*.—A loſs having happened, the defendants produced a policy underwritten by one *J. S.*, upon the ſhip only, in which the plaintiff had no intereſt.—Lord *Mansfield*, who tried the cauſe, ſaid;—"I ſhall conſider the defendants as the actual inſurers, and therefore the plaintiff muſt prove his intereſt and loſs."—The defence ſet up was, that the letter to the plaintiff was written by the defendant's clerk through miſtake: It was alſo contended that trover would not lie for that which never exiſted. But his lordſhip would not ſuffer the defendants then to contradict their own repreſentation; and the plaintiff accordingly had a verdict to the amount of his intereſt, deducting the premium.

Sect.

Sect. 3.

Of the Form and Requiſites of the Policy.

At what time the preſent form of the policy was introduced.

IT is very probable that the form of a policy of inſurance nearly ſimilar to that which we have now in uſe, was introduced into *England* by the *Lombards*, with their other commercial improvements *(a)*. In the courſe of ſeveral centuries this form muſt have undergone ſome alteration. But the fear of departing too far from the original muſt have ſuggeſted the clauſe inſerted in every policy, that 'it ſhall be of as much force and effect as 'the ſureſt writing or policy of aſſurance heretofore made 'in *Lombard-ſtreet*,' &c. And merchants, apprehenſive of the danger attending every innovation in the forms of commercial contracts, have always been particularly tenacious of the form of this important inſtrument, though, in itſelf, extremely inaccurate, and unſkilfully framed *(b)*. But length of time, frequent diſcuſſion, and repeated deciſions upon the conſtruction of it, have reduced it to a conſiderable degree of certainty.

How it ought to be conſtrued.

From the nature and object of this contract, courts of juſtice have always conſtrued it according to the intention of the parties, and ſo as that the indemnity of the inſured, and the advancement of trade, which are the great objects of inſurance, may be attained. 'The *ſtrictum jus*, or *apex juris*, is not to be laid hold of; but it is to be conſtrued largely for the benefit of trade, and of the inſured. The conſtruction ſhould alſo be according to the courſe of the trade in the place *(c)*.

(*a*) Vid. *Malyne lex merc.* 108.—(*b*) Mr. Juſtice *Buller* ſays, that it has always been conſidered in courts of law as an abſurd and incoherent inſtrument. 4 T. R. 210.—(*c*) Per *Lee*, C. J. in *Tiernay* v. *Etherington*, cited by Lord *Mansfield*, 1 *Bur.* 348.

The interpretation should be according to the rules of the common law.

When a clause is clear in itself, it ought to be understood literally (*a*). But when clauses are obscure, the best and only mode of fixing their meaning is by the rules of the common law; because the parties must be presumed to make their agreements subject to that law.

Occasional clauses.

It is often necessary to introduce additional clauses into the policy, to adapt it to the particular stipulations of the parties, and it cannot but be matter of surprise to observe that these clauses, though sometimes of the utmost importance to the parties, are drawn up, not only without advice, but even without common attention to their import. Lord *Mansfield*, while observing upon the inaccuracy of one of these clauses, declared that he did not recollect an instance of an addition of this sort, which had not created doubts on the construction of it; and this frequently happened where a word or two more or less, would have rendered the whole perfectly clear (*b*).

How occasional clauses should be construed.

In construing such clauses it might not be improper to inquire by whom they were introduced; for if the party introducing them might have explained himself clearly and explicitly, his not doing so ought not to afford him an occasion to impose restrictions upon the other party, which he has not distinctly expressed (*c*).

The usual requisites of a policy.

The usual requisites of a policy are ten, which we will consider in the order in which they occur.

1. *The Name of the Insured, his Agent or Trustee.*

In *France* the policy was underwritten in blank, and afterwards filled up.

In *France* it was usual, at the time *Emerigon* wrote, for the broker to produce the policy in blank to the underwriters, who signed it without seeing more than a

(*a*) Il n'est pas permis d'interpréter ce qui n'a pas besoin d'interpretation. *Vattel* liv. 2. ch. 17, n. 263.—(*b*) *Doug.* 257.—(*c*) Pactionem obscuram iis nocere, in quorum fuit potestate legem apertius conscribere. *Dig.* l. 2. tit. 14. de pactis leg. 39.—Labeo scripsit obscuritatem pacti nocere potius debere venditori qui id dixerit, quam emptori; quia potuit re integra apertius dicere. *Dig.* l. 18, tit. 1, de cont. emp. leg. 21.

Short

ſhort memorandum indorſed on it; and the broker afterwards filled up the policy at his leiſure. It muſt be owned that there are ſometimes critical moments which will admit of no delay. Nothing but a caſe of ſuch urgent neceſſity can juſtify ſo extraordinary a practice; and though ſeveral laws had been made to reſtrain it, yet it ſtill continued to prevail, at leaſt at *Marſeilles* (*a*).

When the policy, however, was filled up, it was neceſſary to inſert the name of the inſured, or of his agent, and whether he were agent or principal (*b*).

Policies in *England* were formerly in blank as to the name of the inſured.

This was remedied in 1774, as to inſurances on lives.

With us it was formerly the practice to effect policies in blank, as to the name of the inſured. This being found productive of many inconveniences, a regulation was adopted in *England*, in the year 1774, with reſpect to inſurances upon lives (*c*), ſimilar to ſome that had been introduced in ſome foreign countries, on the ſubject of marine inſurances; and about the year 1785, it became a ſubject of complaint amongſt underwriters that the policies were ſo looſe and indefinite, that they had no opportunity of knowing for whom the inſurances were made, nor what was the nature of the things inſured. They therefore deſired to know at leaſt the name of ſomebody concerned, no matter whether the principal or the agent; for though they might not know the principal, yet, if they knew the agent, they might have ſome confidence, that if he were a merchant, or other perſon of character, he would not be engaged in a diſhoneſt tranſaction (*d*). Theſe conſiderations induced the legiſlature to paſs the ſtat. 25 *G.* III. c. 44, which, after reciting that certain miſchiefs had reſulted from the practice of effecting marine inſurances in blank, directed "That where the inſured reſided in *Great Britain*, his name, or that of his agent, ſhould be inſerted in the policy, as the perſon intereſted; and where he reſided abroad, the name of his agent ſhould be inſerted.'

Inconveniences of marine policies being in blank.

By 25 *G.* III. c. 44, the name of the inſured, or his agent, was to be inſerted, if the inſured reſided in *Great Britain*; if not the name of his agent.

(*a*) *Emerig.* tom. 1, p. 47. Vid. 2 *Magens*, 65, 169.—(*b*) *Emerig.* tom. 1, p. 55.—(*c*) Stat. 14 G. III. c. 48.—(*d*) Vid. Mr. Juſtice *Buller's* obſervations on the ſtatutes, 25 and 28 *G.* III. 1 *Pul.* and *Boſ.* 321 and 352.

How this was construed.

Upon the construction of this act it was, soon after the passing of it, determined, that the agent's name must be inserted *eo nomine*, as agent; and that if the principal were abroad, the agent, in whose name the insurance was made, must be resident here (*a*); and it was likewise holden that the names of *all* the parties interested should be also inserted (*b*).

This act was repealed by the 28 *G.* III, c. 56, which provides that the names or firm of the persons interested, or the name of one of them, or the name of the person who gives or receives the order to insure, shall be inserted.

This being found productive of greater inconveniences than those which the act was meant to remove, it was repealed by the stat. 28 *G.* III, c. 56. But it was still thought advisable to restrain the making of policies in blank; and therefore this last act provides, that 'No 'person shall effect any policy, on any ship or goods, 'without first inserting the name or names, or the usual 'stile and firm of dealing, of one or more of the persons 'interested; or of the consignor or consignors, consignee 'or consignees, of the property to be insured; or of the 'person or persons residing in *Great Britain* who shall 'receive the order for, and effect such policy; or of the 'person or persons who shall give the order to the agent 'or agents immediately employed to negociate or effect 'such policy; and every policy made contrary to the 'true intent and meaning of this act, shall be null and 'void.'

This act ought to be construed liberally and according to its intent. Therefore if a consignee refuse to accept a cargo of goods, or to accept bills of exchange for the amount, the general agent of the consignor becomes in effect the consignee, and may insure in his own name.

This act ought not to be taken in its strict literal sense, but ought to receive a liberal construction, according to its *true intent and meaning*. And therefore the following case will shew, that if bills of exchange, drawn on the consignee of a cargo of goods, for the amount of them, be sent, together with bills of lading, by the consignor to his general agent, with directions to deliver the bills of lading to the consignee, on his accepting the bills of exchange; if the consignee refuse to receive the goods, or to accept the bills of exchange, the agent becomes in effect the consignee, within the intent and meaning of the statute; and may insure the goods as *agent for the consignor*; or, *in his own right*, if he has accepted bills on the credit of the goods.

(*a*) R. *Praye* v. *Edie*, 1 T. R. 313.—(*b*) Per *Buller*, J. in *Wilton* v. *Reaston*, at N. P. after Mich. 1787, *Park* 17.

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An inſurance was made by the plaintiffs, "as well in "their own names, as for and in the name and names of "all and every other perſon or perſons to whom the ſame "did, might, or ſhould appertain, in part or in all, upon "goods on board the ſhip *Fahrſunds Wharf*, at and from "*Fahrſund* to *London*."—The ſhip being loſt on the voyage inſured, an action was brought on this policy; and the firſt count in the declaration averred that the inſurance was made by the plaintiffs reſiding in *Great Britain*, as agents, and for the uſe of one *Jochum Brink Lund*, who was intereſted in the goods to the amount of the ſum inſured; and the ſecond count averred the intereſt to be in the plaintiffs, and that they made the inſurance on their own account. The defendant having tendered the premium, pleaded the tender. Upon the trial of the cauſe it appeared, that the plaintiffs were the general agents in *London* of one *Lund*, a merchant at *Fahrſund* in *Norway*, who had agreed with certain perſons in *London*, under the firm of the *Cudbear* company, to ſupply them with a quantity of moſs; and having, on the 12th of *November* 1796, ſhipped 574 ſacks of moſs at *Fahrſund*, conſigned to the *Cudbear* company, and upon their account and riſk, tranſmitted to the plaintiffs the invoice and bill of lading, in a letter containing theſe words,—"Pleaſe to hand the incloſed to the *Cudbear* "company, that theſe friends may have an opportunity "to ſecure themſelves by inſuring the moſs cargo, the "ſeaſon being ſo far advanced." That on the 10th of *December* 1796, *Lund* drew a bill on the *Cudbear* company for 1112 l. 8 s. 2 d. the amount of the cargo, in favour of the plaintiffs, and ſent it to them to procure acceptance thereof, and place it to his credit; and, at the ſame time, adviſed the plaintiffs that he had drawn on them for 300 l. which bill they afterwards accepted and paid.—That the *Cudbear* company received the bill of lading and invoice, and the bill for 1112 l. 8 s. 2 d being preſented to them for acceptance, they refuſed to accept it, or take the cargo, or to inſure it; and returned the bill of lading and invoice to the plaintiffs. That the plaintiffs thereupon cauſed the above inſurance to be made on

A. having conſigned goods to *B* and drawn bills on him to the amount of them in favour of *C.* his general agent, ſends theſe bills, together with the bills of lading, to *C.* deſiring him to tranſmit them to *B.* that *B.* may have an opportunity of inſuring. *A.* alſo draws a bill on *C.* for 300 l. which is accepted and paid. *B.* refuſes to take the goods, or accept the bills drawn on him. *C.* then inſures in his own name, and informs *A.* thereof, who approves what he has done.—*C.* may maintain an action on the policy, as agent of *A.* and aver the intereſt to be in him; *C.* being in effect conſignee, on *B*'s refuſal to take the goods, and alſo having in effect, received, as well as given, the order to inſure, within the meaning of the 28 *G.* III. c. 56.—*C.* may alſo declare in his own right, averring intereſt in himſelf, he having an inſurable intereſt to the amount of 300 l.

Wolf and others v. *Horncaſtle*, 1 *Pul.* and *Beſ.* 316.

the 9th of *January* 1797, without any order ſo to do; and the next day wrote to *Lund*, informing him what had been done; that *Lund*, in his anſwer, approved of their having taken the precaution to inſure the moſt cargo, and informed them of the ſhip's having ſailed.—On this caſe it was contended on the part of the defendant, that the ſtat. 28 *G.* III. c. 56 (*a*), requires that the name of the perſon intereſted, or of the conſignor, or conſignee, or of the perſon who gives, or receives, the order to inſure, ſhould be inſerted in the policy; none of which characters applied to the plaintiffs, who had received no order to inſure, at the time the policy was effected; and the ſubſequent approbation of *Lund* could not be deemed equivalent to a previous order, and therefore the policy was void.—But the court determined that the policy was good within the meaning of the ſtatute, and that the plaintiffs had an inſurable intereſt.—Mr. Juſtice *Buller* (*b*) ſaid,—"This policy in its frame is very much like thoſe we uſed to ſee ſome years before the legiſlature interpoſed in the ſtat. 25 *G.* III. c. 44 (*c*); only I remember that the words, "*as intereſt may appear*," were then uſually added. The ſhip ſailed on her voyage with the goods on board; the premium was paid; it was a real *bonâ fide* tranſaction, and no fraud has been ſuggeſted; a loſs has happened, and the underwriter now chuſes to ſay, that, for want of a ſtrict compliance with the ſtat. 28. *G.* III., he ſhall be excuſed from paying the money. Time was, when no underwriter would have dreamed of making ſuch an objection; and if his ſolicitor had ſuggeſted a loop-hole by which he might have eſcaped, he would have ſpurned at the idea. If, however, the defendant can bring his caſe within the ſtatute, he has a right to do ſo, and we are bound to give him judgment. But he has brought it neither within the words or the meaning of the ſtatute: And even if he had brought it within the words, and not within the meaning, I ſhould be clearly of opinion, that we ought

(*a*) Sup. 214.—(*b*) Lord C. J. *Eyre* was abſent.—(*c*) Sup. 213.

to decide againſt him, according to the directions of the ſtatute, which in the laſt clauſe ſays, "Every policy of "inſurance made contrary to *the true intent and meaning* "of this act, ſhall be null and void." By putting the two acts 25 *G.* III. and 28 *G.* III. together, we may learn the true ſpirit and meaning of the latter of theſe acts, which we are bound to ſay, muſt receive the moſt liberal conſtruction that the words will bear. From the language of the two ſtatutes, as well as the conſideration that we are conſtruing a contract *uberrimæ fidei*, viz. a policy of inſurance, we muſt avoid being harder upon the plaintiffs than is abſolutely neceſſary. Let us ſee whether the plaintiffs do or do not come within any of the deſcriptions of perſons in the laſt ſtatute. Theſe deſcriptions are four; the *conſignor* and *conſignee*, the perſon *receiving*, and the perſon *giving*, the order. The plaintiffs are certainly not the conſignors; but I am by no means clear that they are not the conſignees. It is true that the goods were originally conſigned to another perſon: But the caſe muſt be conſidered as it ſtood at different periods; and though the *Cudbear* company were clearly the conſignees at firſt, it does not follow that they continued to be ſo. A conſignee is a perſon to whom the goods are to be delivered when they arrive at the port of delivery. *Lund*, that he may be ſure of being paid, and not chuſing to truſt the *Cudbear* company, ſends the bill of lading, with a bill on them for acceptance to the plaintiffs, who are his general agents. If the *Cudbear* company had received the goods, they would have been the conſignees; but they refuſed to receive them. Then who was entitled to receive them? It cannot be pretended, that nobody had the right. The captain could not keep them. Then, to whom could the right belong, but to the perſons who had the bill of lading, and were the general agents of the conſignor? From the moment, therefore, that the *Cudbear* company refuſed the goods, the plaintiffs became the conſignees. If this be ſo, there is no objection to the policy, and I am ſatisfied I do not carry this conſtruction too far, in favour of the juſtice of the caſe.—The next character mentioned in the ſtatute,

ſtatute, is *the perſon who receives the order* to make inſurance. The goods were originally intended for the *Cudbear* company. But they were ſent, accompanied by a letter, from which the plaintiffs muſt have ſeen that it was *Lund*'s intention to have them inſured. It was his intereſt that they ſhould be inſured; and it is agreed, that a general agent has a right to exerciſe his diſcretion for the benefit of his principal. He muſt act on the ſpur of the occaſion; and if nothing elſe had paſſed, I have doubts whether *Lund* would not have been liable to pay the premium. But his ſubſequent approbation brings the caſe within the maxim, that *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur.* I am clear, therefore, that the plaintiffs received the order to make this inſurance, within the meaning of the act.—The laſt character mentioned in the act, is the *perſon giving the order* to make inſurance. Now it is impoſſible to ſtate a caſe that comes more directly within the act of parliament than this. Here the plaintiffs were the perſons immediately concerned; they employed the broker, and gave the immediate order for the inſurance, and conſequently they come within the words of the act. The caſe therefore, upon the firſt count, is clear of all objections, and is in law, conſcience, and juſtice, in favour of the plaintiffs.—With reſpect to the ſecond count, I hold that the plaintiffs had a clear right to inſure to the amount of 300*l.* for which they were intereſted in the goods. I agree that a debt which has no reference to the article inſured, and which cannot make a *lien* on it, will not give an inſurable intereſt. But a debt which ariſes in *conſequence* of the article inſured, and which would have given a *lien* on it, does give an inſurable intereſt. The caſe is not at all altered by the circumſtance of the goods not having arrived. There is no tranſaction more common in the city of *London*, than to raiſe money on the ſecurity of a bill of lading and policy. Theſe plaintiffs, having advanced their money on that ſecurity, muſt, if the goods had arrived, have received 300*l.* out of them: The goods being loſt, the policy ſtands in place of them, and the plaintiffs are entitled to receive that ſum under it.

A general agent may inſure without an order for that purpoſe, when it is for the intereſt of his correſpondent that he ſhould do ſo.

A debt which would have given a *lien* on the thing inſured, gives an inſurable intereſt.

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The chief juſtice, when this caſe was firſt moved, delivered a clear opinion in favour of the plaintiffs, and I think the caſe moſt decidedly with them."—Mr. Juſtice *Heath* fully concurred in this opinion, and ſaid,—"This ſtatute was made to prevent unlawful gaming; it therefore enacts, that no perſons ſhall recover under policies of inſurance, but thoſe who have either an intereſt as principals, or have acted as agents: In the firſt place, then, I think the plaintiffs were clearly the conſignees of the goods; for the bills of lading were ſent to them, and they had a right to take poſſeſſion. The act alſo ſays, that if the name of the conſignor or conſignees be not inſerted, that of the perſon giving the order for the inſurance ſhall be inſerted. While the ſhip is in ſafety, where is the difference whether the agent inſure without order, and the principal afterwards approve of the inſurance; or, firſt receive the order, and then inſure.—On the ſecond count, it is equally clear, that the plaintiffs had an inſurable intereſt. It is true, that if the *Cudbear* company had altered their minds and taken the cargo, the plaintiffs would have had no intereſt; but if they had a contingent and reaſonable expectation of intereſt, it was ſufficient to entitle them to inſure, according to what is held in *Le Cras* v. *Hughes* (*a*), viz. that a certain expectation of recovering from the crown, property captured for the emolument of the captors, would give an inſurable intereſt."

A contingent and reaſonable expectation of intereſt is ſufficient to entitle the party to inſure.

So, where an inſurance was effected in the name of *Grandelos Meſſe* and company, who were brokers, and alſo agents to *De Vignier* the plaintiff in ſeveral money tranſactions, and both reſided in *London*. *Grandelos Meſſe* and company were not deſcribed as agents in the policy, but in the declaration were ſtated to be "the perſons reſiding in *Great Britain* who received the order for and effected the inſurance," and the intereſt was averred to be in the plaintiff.—A verdict being found for the plaintiff, the defendant moved to ſet it aſide and enter a nonſuit, on an objection to the form of the policy, as

If the name of the broker effecting the policy be inſerted in it, it is a ſufficient compliance with the 28 *G.* III. c. 56, though he be not deſcribed therein as *agent*.

De Vignier v. *Swanſon*, 1 *Pul.* and *Boſ.* 346, n.

(*a*) Sup. 84.

not

not ſufficiently complying with the ſtat. 28 *G.* III. c. 56, becauſe effected in the name of *Grandelos* and company, without ſtating them to be *agents*. But upon the caſe coming on to be heard, Lord *Kenyon* ſaid, he was ſurprized to find that the rule had been drawn up, as there was nothing in the caſe; and accordingly it was diſcharged without argument.

So, though it ſhould appear that the agent named in the policy be not a *general* agent, but only agent for that particular purpoſe.

Bell v. *Gilſon*, 1 *Pul.* and *Baſ.* 345, ſup. 71.

The ſame objection was made, notwithſtanding the two foregoing caſes, in a caſe in which the policy deſcribed *Barret* and company, the brokers, in whoſe names it was effected, "as agents;" and a diſtinction was endeavoured to be be made between this and the two foregoing caſes, upon the ground, that in thoſe, the perſon named in the policy, was the *general* agent of the party intereſted; whereas, in this caſe, *Barrett* and company were only agents for this purpoſe.—But the court over-ruled this objection, ſaying, that after the two foregoing deciſions, one in the *King*'s *Bench*, and the other in the *Common Pleas*, within the ſame term, upon the ſame point, this queſtion ought to have remained at reſt.

Vid. inf. ch. 11, § 4.

2. *The Names of the Ship and of the Maſter.*

In a policy on goods, the ſhip muſt be named.

In almoſt all caſes of inſurance upon goods, it is uſual and neceſſary to ſpecify in the policy the ſhip in which they are to be tranſported: For, as ſhips are not all of equal ſtrength and goodneſs, nor equally capable of performing any particular voyage, the inſurer would be unable to form a juſt judgment of the riſk, unleſs he were informed of the name and deſcription of the veſſel (*a*). This being inſerted in the policy, it becomes a part of the contract that the adventure ſhall be on board the very ſhip ſpecified, and no other; nor can any other veſſel be ſubſtituted for it, unleſs through neceſſity, or with the conſent of the inſurer (*b*).

And the ſhip cannot be changed but from neceſſity, or with the conſent of the inſurer.—

Vid. inf. ch. 11, § 3.

(*a*) Quia non par eſt ratio aſſecurationis, quando merces devehuntur, in una navi, et quando in altera; imo ſolet id principaliter conſiderari inter ipſos aſſecuratores, cum una navis ſit magis fortis quam alia. *Roc.* h. t. not. 28. Vid. *Santerna*, h. t. p. 3. n. 315. *Stracca*, gloſ. 8. n. 10.—(*b*) The ſubject of changing the ſhip will be found fully treated, inf. c. 11, § 3.

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In what caſes goods may be inſured, on board *ſhip or ſhips.*

Vid. inf. ch. 11, § 4.

It often happens, however, that, in the trade carried on with diſtant countries, particularly in time of war, it is uncertain by what ſhips goods may be ſent from thence to *Europe*. It is, therefore, of great importance to the merchant to be at liberty to avail himſelf of the firſt veſſels that may offer for that purpoſe, and to make his inſurance on the goods on board ſuch veſſels; and, in ſuch caſe, the policy is upon the goods '*on any ſhip or ſhips*;' and this is now ſo well eſtabliſhed, both by uſage and authority, that the legality of it is indiſputable.

The ſpecies of veſſel muſt be truly mentioned.

Not only the name, but alſo the ſpecies of veſſel ought to be mentioned; and if this be done falſely, in order to miſlead the inſurer, and diminiſh the riſk, as if a brig, a ſloop, or other ſmall veſſel be deſcribed as a *ſhip*; this will vitiate the contract. But if the error in the deſcription of the veſſel ariſe only from miſtake or inadvertence, and it does not affect the riſk; or if the inſurers knew upon what veſſel the riſk was to be run, the falſe deſcription in the policy will not affect the contract (*a*).

If the ſhip be a privateer or letterof marque, ſhe ſhould be deſcribed as ſuch.

Emerigon ſays, that if the inſurance be made on a *privateer*, this ſhould be mentioned in the policy: And even in the caſe of a *letter of marque* it is prudent, he ſays, to deſcribe her as ſuch. And he adds, that if this circumſtance be not declared, and the ſhip be captured in purſuit of an enemy which ſhe might have avoided, the inſurers ſhall not anſwer for the loſs (*b*).

The name of the maſter muſt likewiſe be ſpecified.

But the owner may change the maſter.

The name of the maſter, alſo, ſhould be ſpecified; becauſe his character and ability are material ſubjects of conſideration in eſtimating the riſk (*c*). If the name of the maſter ſtood alone in the policy, without any clauſe to enable the inſured to employ another in his place, it would be a part of the contract that he, and no other, ſhould go for maſter; nor could any other be ſubſtituted in his place, unleſs in a caſe of neceſſity, or by conſent

(*a*) *Emerig.* tom. 1, p. 164.—(*b*) *Emerig.* tom. 1, p. 161.—(*c*) In *France* and *Holland* the inſertion of the names of the ſhip and the maſter is enjoined by poſitive law. With us there is no ſuch law. The whole reſts on uſage, and the neceſſity of inſerting what it is ſo proper for the inſurer to know.

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of the insurer. To obviate the difficulties that must arise from this, the following words are always added in our policies, "*or whosoever else shall go for master in the said ship* (*a*)."—But though this clause enables the owner to change the master when he sees occasion to do so; yet he ought not to do this wantonly or unnecessarily; much less ought he to name one, when he means to employ another; for this could only be done for the purpose of deceiving the underwriters, and would, of itself, be strong evidence of fraud.

But this ought not to be done unnecessarily.

3. *The subject Matter of the Insurance.*

The policy must likewise specify the subject matter of the insurance, whether it be goods, ships, freight, respondentia, bottomry securities, or other things.

It may be on goods and merchandizes generally.

If the insurance be on goods, it is not necessary to particularize the different sorts; it is usually expressed to be '*upon any kind of goods or merchandizes*'. In many cases it would be impossible to specify the different sorts of goods of which a cargo may consist; and this is the less necessary, because the memorandum inserted at the foot of every policy, protects the underwriter from any partial losses on those articles which are most perishable, and from small partial losses on all others (*b*).—Where the particular goods insured are meant to be specified, this is usually done at the foot of the policy; thus, '*On woollen cloth*;' sometimes on goods generally, with the mark of each bale, cask, &c.—It is not necessary that the goods should be specified in the policy; yet this is sometimes done for the satisfaction of the underwriters. And where they are specified, if they be not put on board, the policy will be void, although the insured have other goods of equal value on board. As if an insurance be made on a quantity of *tortoise shell* on board a certain

Or the goods may be specified.

If the goods specified be not put on board, the policy will be void, though the insured have other goods of equal value on board.

(*a*) The *French* express it, '*ou autre pour lui.*' This clause appears to be very ancient, and is found in the forms of the policies of most foreign countries. Vid. *Emerig.* tom. 1, p. 182.
(*b*) Vid. sup. c. 6, § 3.

ship;

ſhip; but inſtead of tortoiſe ſhell, a quantity of *indigo* is ſhipped for the inſured: The inſurer ſhall not be liable for any loſs upon the indigo.—So, if an inſurance be made on *oils and barilla*; this will not protect a cargo of *ſoap*, though theſe are the principal ingredients in ſoap. The ſpecies of a thing is aſcertained by its ſubſtantial form.—That being changed, produces a new ſpecies and deſtroys the old. And yet an inſurance on ingots of gold has been holden to protect the metal converted into utenſils or coin; becauſe the ſubſtance is ſpecifically the ſame, and may be converted into ingots again (*a*).

When, indeed, a cargo conſiſts of very few articles, it may be proper to mention them particularly. And where the goods are valued by the hogſhead, pipe, bale, &c. it is of courſe to ſpecify the commodity. But if an inſurer ſubſcribe a policy 'upon any kind of goods 'and merchandizes,' there can be no queſtion but that he is bound by it, though no one article be ſpecified (*b*).

When the goods conſiſt of but few articles, or are valued by the hogſhead, pipe, bale, &c. they are generally ſpecified.

Reſpondentia and bottomry ſecurities are a ſpecies of property which may be the ſubject of inſurance, though they are in effect themſelves a ſpecies of inſurance. But then they muſt be particularly and ſpecifically deſcribed in the policy; for, under the general denomination of *goods*, theſe ſecurities cannot be inſured. This will appear in the following caſe.

Reſpondentia and bottomry ſecurities muſt be inſured *eo nomine* as ſuch.

An inſurance was made, "on *goods and merchandizes*, on "board a certain ſhip, at and from *Bengal* to *London*."—Before the ſigning of the policy, the plaintiff had lent captain *Tryon* 764 l. upon reſpondentia, upon goods of greater value belonging to him on board the ſhip, and for which he gave a reſpondentia bond in the common form. The ſhip and goods were conſumed by fire and totally loſt.—On this caſe, the queſtion was, whether the plaintiff could recover the amount of his reſpondentia intereſt, upon this policy on *goods*.—On the part of the plaintiff was cited the ſtat. 19 *G.* II, c. 37, § 5, which

In an action on a policy on *goods*, the plaintiff cannot give in evidence a reſpondentia bond as a proof of intereſt in the goods which the obligor has on board.

Glover v. *Black*, 3 *Burr.* 1394, 1 *Bl.* 399, 405, 422.

(*a*) Vid. *Emerig.* tom. 1, p. 299, 300, 301.—(*b*) Vid. 1 *Mag.* 8.

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provides, "that money lent on bottomry or reſpondentia, in the *Eaſt India* trade, ſhall be lent only on the ſhip or goods, and inſured only by the *lender*; and that the borrower ſhall not recover on any inſurance more than the value of his intereſt in the ſhip or goods, *excluſive* of the money borrowed; and that, if this do not amount to the ſum borrowed, he ſhall be reſponſible to the lender for ſo much as he has not laid out on the ſhip or goods, with intereſt, inſurance, and all other charges." And it was argued from thence, that reſpondentia intereſt was inſurable as goods, *eo nomine*, becauſe one is made the meaſure of the other; and the inſurer always conſiders reſpondentia as goods, ſince he allows the bond itſelf to be the only proof of intereſt neceſſary, and never enquires after the value of the goods.—On the part of the defendant it was inſiſted, that the lender of money upon reſpondentia, had not, like a mortgagee, an intereſt in the goods of the borrower on board; for the property and poſſeſſion both remained in the borrower; and therefore reſpondentia ought to be inſured *nominatim*, and ſpecifically. That if an inſurance on goods intitled the inſured to recover on a reſpondentia intereſt, the inſurer would be liable to be defrauded: For if the ſhip came home ſafe, the inſured would be intitled to a return of premium, upon ſhewing, *that he had no goods on board*; but in caſe of loſs, he might claim as he then did, upon his reſpondentia intereſt.—The court were unanimouſly of opinion, that a reſpondentia bond was not evidence of an inſurable intereſt in the goods on which the money was lent.—Lord *Mansfield*, in delivering the judgement of the court, ſaid; —"At the trial of this cauſe, and ſince, I have leaned as much as poſſible to ſupport this inſurance; becauſe it appeared to have been made in this form, not through deſign, but merely by a ſlip, in not inſerting the word reſpondentia. To be ſure, the ſtat. 19 *G.* II. c. 37, § 5, does not conſider the owner of the goods as having a right to inſure for more than the ſurplus value of the goods, above the money borrowed on reſpondentia. To many purpoſes the reſpondentia creditor has a lien on the goods:

goods: But we are ſatisfied that this act never meant to alter the manner or form of inſurances: It only meant to prevent wagering policies. The act itſelf deſcribes the inſurance by the creditor to be on the *money lent*, and leaves it upon the practice. Now, in practice, bottomry and reſpondentia have always been conſidered as a particular ſpecies of inſurance, and have taken a particular denomination. All the forms expreſs the inſurance to be on bottomry or reſpondentia: Nor is there a *dictum* that reſpondentia can be inſured under the denomination of *goods*. It would be very dangerous, therefore, to eſtabliſh a precedent to the contrary; ſince the conſequence may be bad, and introductive of frauds, though we cannot now ſee the particular mode of them. The ground of our determination is, that, by the cuſtom of merchants, reſpondentia is inſured under a ſpecial denomination. But we by no means ſay, that under an inſurance on goods at large, a man may not be permitted to give in evidence a mortgage or other ſpecial lien."

An exception to this rule.

Yet the uſage of a particular trade may ſanction a departure from this rule.—As where the captain of an *Eaſt Indiaman* made an inſurance on "*goods, ſpecie, and effects* on board:" He was permitted to recover for money laid out for the uſe of the ſhip in the courſe of the voyage, and for which he charged *reſpondentia intereſt*; it being proved that this ſort of intereſt was always inſured in this manner in the *Eaſt India* trade.

Gregory v. *Chriſtie*, B. R. Tr. 24 *G.* III. ſup. 94.

The maſter's clothes, the ſhip's proviſions, and goods laſhed to the deck, cannot be inſured as goods.

There are even certain articles, which, though they may be properly called goods, yet are not comprehended under the general denomination of goods, wares, and merchandizes in the policy; and therefore the inſurer is not liable for any loſs upon theſe articles, unleſs they be ſpecifically named: Such are the maſter's clothes, and the ſhip's proviſions, which are conſidered as a part of the furniture of the ſhip (*a*).—Neither are goods laſhed to the deck comprehended under the name of goods, unleſs

Vid. ſup. ch. 3, § 5.

(*a*) Vid. *Brough* v. *Whitmore*, 4 T. R. 206, ſup. 182.

they be particularly deſcribed; becauſe they are expoſed to greater danger than goods uſually are, and conſequently the premium for inſuring them is greater (*a*).

Money, jewels, or bullion, may be inſured under the denomination of goods.

It has been queſtioned whether foreign coin, jewels, or bullion, could be inſured under the general denomination of goods, wares, and merchandizes (*b*). It certainly appears from *Magen*'s collection of foreign ordinances (*c*), that in ſome places there are poſitive regulations which require that gold and ſilver, whether coined or uncoined, and jewels, ſhall be particularly ſpecified in the policy. In *France*, theſe articles may be inſured under the denomination of goods and merchandizes, provided the tranſport of them be not prohibited (*d*). And with us it is uſual to inſure them generally as merchandize; but it is not underſtood that the inſurer is liable for the riſk of a clandeſtine exportation (*e*).

But the inſurer is not liable for the riſk of a clandeſtine exportation of theſe articles.

Jewels, &c. worn by perſons on board, are not included in a policy on goods.

A diſtinction has generally been made between money, jewels, rings, trinkets, &c. which are a part of the *cargo*, as articles of commerce, and ſuch as are merely *perſonal*, and are not meant to be diſpoſed of as ſuch. The jewels and ornaments which are worn by perſons on board, and which are not conſidered as forming a part of the cargo, nor liable to contribute to a general average (*f*), would not be conſidered as included in a general policy on goods (*g*).

An

(*a*) R. *Roſs* v. *Thwaites*, at N. P. *Park* 20, poſt. c. 17, § 5.—(*b*) *Park*, 22.—(*c*) 2 *Magens*, 71, 89, 131, 187.—(*d*) *Emerig.* tom. 1, p. 297.—(*e*) 1 *Magens*, 10. Vid. *Da Coſta* v. *Frith*, 4 *Bur.* 1966, ſup. 108.—(*f*) Vid. inf. ch 13, § 6.—(*g*) Aſſecurans merces in talem navem immiſſas, intelligitur aſſecurare pecuniam, aurum, argentum, gemmas, margaritas, et annulos, in dicta navi exiſtentes, quæ omnia, *appellatione mercium*, in navem immiſſarum, comprehenduntur, licet expreſſa non fuiſſent. *Santerna* declarat quod ſi pecuniæ, margaritæ et annuli erant deſtinati ad vendendum, vel mercandum alias merces, tunc appellatione mercium veniunt, et in aſſecuratione comprehenduntur, et loco mercium habentur: Vocat dictas res merces, cum occaſione earum habeat locum contributio, ſicut aliarum rerum, ne in iſtis aſſecurationibus mercatorum potius appices juris quam veritas

obſervari

An inſurance on a ſhip does not comprehend both ſhip and cargo: And therefore if a merchant inſure a ſhip generally, and ſhe then happen to be laden, the inſurer, in caſe of loſs, ſhall anſwer only for the ſhip, but not for the goods (*a*).

An inſurance on a ſhip does not cover the cargo on board.

4. *A deſcription of the Voyage, with the Commencement and End of the Riſk.*

Every fact and circumſtance relating to the contract of inſurance muſt be ſtated with the moſt ſcrupulous regard to truth. The voyage inſured muſt therefore be truly and accurately deſcribed in the policy; namely, the time and place at which the riſk is to begin, the place of the ſhip's departure, the place of her deſtination, and the time when the riſk ſhall end, whether on goods, or on the ſhip. If a blank be left for the place either of the ſhip's departure or deſtination, the policy will be void for the uncertainty.—As if a ſhip be inſured from *London* to ; this blank being left to prevent an enemy's learning the place of the ſhip's deſtination; if the ſhip in her voyage be caſt away, the inſured ſhall not recover his loſs on this policy, though there were private inſtructions for the ſhip's port of deſtination (*b*).

The voyage, with the commencement and end of the riſk muſt be preciſely deſcribed.

If a blank be left either for the place of departure or of deſtination, the policy will be void.

In our ordinary policies, the continuance of the riſk on *goods* is generally expreſſed to be *from the loading thereof on board the ſhip*, and to continue '*until the ſame be diſcharged and ſafely landed*,' at the port of delivery:—Upon the ſhip, on an outward voyage, it is ſometimes from *her beginning to load*, at ſome particular place, or *at and from* ſuch place; ſometimes *from a particular day*. On a homeward voyage, it is generally made to commence *on the ſhip's arrival* at a particular place abroad, or at and from ſuch place; and it continues *till ſhe arrives* at her place of

How the commencement and end of the riſk are uſually ſpecified.

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obſervari videantur: Et tandem, quia large comprehenduntur omnes res quæ ſunt deſtinatæ ad negotiandum et facit etiam quod confiſcatio mercium navis extenditur etiam ad pecuniam numeratam. *Roccus*, not. 17.—(*a*) *Molloy*, b. 2, c. 7, § 18. *Roccus*; n. 16.—(*b*) *Molloy*, b. 2, c. 7, § 14.

deſtination, "*and is there moored* 24 *hours in good ſafety.*"—Certain proviſions are often added to enable the ſhip to touch, ſtay, trade, &c. at certain places out of the direct courſe of the voyage, without being guilty of a deviation.

If the policy be made for a term, it muſt not exceed twelve months.

Sometimes privateers and veſſels which are conſtantly employed in the coaſting trade, are inſured for a term. But, by the ſtat. 35 *G.* III. c. 63, § 12, this term muſt not exceed 12 calendar months.—If it exceed that time, the policy will be void.

The commencement and end of the term muſt be ſpecified.

In policies for time, the commencement and end of the term ſhould be diſtinctly ſpecified. If, however, that ſhould not be ſo preciſely ſtated as it ought to be, it will be ſufficient if it can be collected from the conſtruction of the policy, and the intention of the parties.

A liberty to cruiſe for ſix weeks, means ſix ſucceſſive weeks.

Vid. inf. ch. 12, § 1.

If a letter of marque be inſured from *Liverpool* to *Antigua*, with liberty to cruiſe for ſix weeks; but no time is fixed for the commencement of the cruiſe: This is not to be underſtood as giving a power to cruiſe for ſix weeks at different periods, but only for one uninterrupted period of ſix ſucceſſive weeks (*a*).

Though the deſcription of the voyage be literally true; yet if it be calculated to induce a falſe concluſion, the policy will be void.

Even though the *termini* of the voyage inſured be truly ſtated; yet, if the wording of the policy be calculated to induce in the inſurer a belief that the *voyage* originally began at the port, where, by the policy, the *riſk* is to begin, when in truth the ſhip had brought her cargo from another port; this will be a falſe deſcription of the voyage, and the policy will be void.

A ſhip takes in her cargo at *Leghorn*, and ſails to *Genoa*, and an inſurance is made on the goods from *Genoa* to *Dublin*, "*to begin from the loading.*"—The policy is void; this being a falſe deſcription of the voyage, calculated to induce the

As where goods were inſured, "At and from *Genoa* to "*Dublin*; the adventure to begin *from the loading to equip* "*for the voyage.*"—The cargo, conſiſting of pot-aſh, verdigreaſe, and other periſhable commodities, was put on board at *Leghorn* on the 10th of *Auguſt*, and the veſſel loſing her convoy, put into *Genoa* on the 13th of *Auguſt*, and lay there till the 5th of *January*, near five months, and then ſailed. The inſurance was effected on the 20th of

(*a*) R. *Syers* v. *Bridge*, *Doug.* 509, inf. c. 12, § 1.

January,

January, at which time theſe circumſtances were known to the inſured, but not communicated to the underwriters. The ſhip, in her voyage met with a ſtorm, which conſiderably damaged her cargo, and an action was brought for a partial loſs. On the trial it appeared that, by the uſage, it was material to acquaint the underwriter, whether the inſurance was to begin at the *commencement* or the middle of the voyage.—There was a verdict, however, for the plaintiff; but which was afterwards ſet aſide, and a new trial granted; the court being clearly of opinion, that from the terms of the policy, it muſt be implied that *Genoa* was the *port of loading*, which was not true; and this being a miſrepreſentation (*a*) of a material circumſtance, the underwriter had a right to ſay that this was not his contract.

underwriter to believe that *Genoa* was the port of loading.

Hodgſon v. *Richardſon*, 1 *Bl.* 463.

So, if the port or ports of the ſhip's deſtination be untruly ſet forth in the policy, the contract will be void. And this is not like the caſe of an intended deviation; for there can be no deviation from a voyage which was never in the contemplation of the party.

The port or ports of the ſhip's deſtination muſt be truly ſtated.

As where a ſhip was inſured, "At and from *Maryland* to *Cadiz*," and was cleared from *Maryland* to *Falmouth*, and a bond given that certain enumerated goods ſhould be landed in *Britain*, and all the other goods in the *Britiſh* dominions. An affidavit of the owner, and the bills of lading ſhewed that the ſhip was bound "to *Falmouth* and a market;" and there was no evidence that ſhe was deſtined for *Cadiz*. She was taken in *Cheſapeak Bay*, in the courſe from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumſtances led to a ſuſpicion that ſhe was, in truth, deſigned for neither place, but for the port of *Boſton*, to ſupply the *American* army; but there was not ſufficient direct evidence of that fact.—The court determined that the plaintiff could not recover in this cauſe.—Lord *Mansfield* ſaid; —"The policy, on the face of it, purports to be a voy-

A ſhip, inſured from *A.* to *B.* appears by her papers to have had a different voyage in view, and is taken in the track to both places, before the dividing point.—This is no deviation, but a different voyage, and the inſurers are diſcharged.

Wooldridge v. *Boydell*, Doug. 16.

(*a*) This is not ſo properly a miſrepreſentation, as a falſe deſcription of the voyage inſured.

age to *Cadiz*. *All contracts of insurance must be founded in truth, and the policies framed accordingly.* When the insured intends a deviation from the direct course, it is always provided for, and the indemnification adapted to it. In all cases of deviation, the *termini a quo* and *ad quem*, are certain and the same. Here the voyage was never intended for *Cadiz*."—Mr. Justice *Buller* said;—"There cannot be a deviation from a voyage which never existed. The weight of the evidence is, that the voyage was never designed for *Cadiz*."

Freight is insured from *A.* to *B.* but the goods, in truth, are intended to be sent to *C.*; the policy is void.

Murdock v. *Potts*, at N. P. after Trin. 1795, *Park* 299.

So also, where an insurance was made on *freight*, "At and from *Bourdeaux* to *Virginia*."—It appeared in evidence, that the goods were, in fact, to be carried to *St. Domingo*, and that the ship was only to call at *Norfolk* in *Virginia* for orders:—Lord *Kenyon* was of opinion, that the underwriters must suppose that the goods were consigned to *Virginia*. But the freight payable, being for the carriage of them to *St. Domingo*, it was different from the freight insured; and though the ship was to call at *Virginia*, that did not alter the case.—The plaintiff was nonsuited, and no application was made to set the nonsuit aside.

Whatever may have been the original intention of the insured, if the ship in fact, sail on a voyage different from the voyage insured, the policy is discharged.

A ship is insured from a certain day, from *A.* to *B.* and before the day she sails on a different voyage, the policy is discharged.

Way v. *Modigliani*, 2 T. R. 30.

And whatever may be the *intention* of the insured at the time the insurance is effected, if, in fact, the ship sail on a voyage different from the voyage insured, the policy is discharged; not, perhaps, on the ground of a wilful misrepresentation, but because the ship never sailed on the voyage described in the policy, and there is no inception of the risk insured against.

Thus:—A ship was insured, "At and from the 20th of *October* 1786, from any ports in *Newfoundland* to *Falmouth*, or her ports of discharge in *England*, with liberty to touch at *Ireland*, and any ports in the *Channel*."—On the first of *October*, the ship left *Newfoundland*, went to the *Banks*, fished there till the 7th, sailed on that day from thence for *England*, and in that voyage was lost on the 30th of *November*.—In this case the question was, whether the policy ever attached, and whether it was not discharged, the ship never having sailed on the

voyage

voyage inſured.—On the part of the inſured, it was contended, that though the riſk of the inſured began from the 7th, yet, as the riſk of the underwriters was not to commence till the 20th, it could make no difference to them; and, in fact, their riſk was conſiderably leſſened, as the ſhip was part of her way home before the policy could attach.—But the court decided, that as the ſhip, inſtead of ſailing for *England*, the voyage inſured, ſailed *to the Banks*, which was a different voyage, the policy was diſcharged.

But, in the following caſe, which was determined ſince the above, it has been holden, that though there be a *previous deſign* to touch at a port out of the uſual courſe of the voyage inſured, and the ſhip be even furniſhed with clearances for that port; yet, if the *termini* of the intended voyage be the ſame as thoſe of the voyage mentioned in the policy, this ſhall be conſidered only as an *intention to deviate*.

But though there be a previous deſign to touch at a place out of the courſe of the voyage; yet, if the *termini* of the voyage be the ſame, this ſhall only be deemed an intention to deviate.

An inſurance was made on goods, "At and from *Grenada* to *Liverpool*, in ſhip or ſhips:"—It appeared that the ſhip, on board of which the goods were laden, ſailed for *Liverpool*, but with a deſign, *formed before the commencement of the voyage*, (as appeared by her clearances, and was admitted on all ſides), to touch at *Cork* in her way; but was totally loſt before ſhe arrived at the dividing point.—Upon this caſe (*a*), it was determined that, the inſured was intitled to recover.—For the *termini* of the intended voyage being really the ſame as thoſe deſcribed in the policy, it was to be conſidered as the ſame voyage; and a *deſign* to deviate, not effected, would not determine the policy (*b*). That in *Wooldridge* v. *Boydell* (*c*), it appeared that there was no intention that the ſhip ſhould go to *Cadiz* at all; and in *Way* v. *Modigliani* (*d*), the ſhip did not, when ſhe left the port in *Newfoundland*, ſail for *England*, but went to fiſh on

A ſhip, inſured from *A.* to *B.* ſails with a *deſign* to touch at *C.*; and before the dividing point, is loſt:—The inſurers are liable.

Rowley v. *Ryan*, 2 *H. Bl.* 343.

(*a*) There were other points in this caſe for which it is cited, inf. c. 21, § 4.—(*b*) Per *Holt*, C. J. in *Green* v. *Young*, at N. P. 2 *Lord Ray* 840, 2 *Salk.* 444.—(*c*) Sup. 229.—(*d*) Sup. 230.

the *Banks*. Here the ſhip was bound for *Liverpool*, though ſhe had alſo clearances for *Cork*.

Diſtinction between an intended deviation and a different voyage.

According to the doctrine of Lord *Mansfield*, in *Weldridge* v. *Boydell*(*a*), a deviation is a departure from the uſual courſe of the voyage inſured; not in conſequence of any avowed deſign, or any orders previouſly given to the captain, but from an after thought conceived during the voyage. If, therefore, a ſhip be inſured from *A*. to *B*, and, *before her departure*, the inſured determine that ſhe ſhall call at *C*., which is out of the uſual courſe of the voyage from *A*. to *B*:—This, according to the above doctrine, cannot ſo properly be ſaid to be an *intended deviation* as a *different voyage*; namely, a voyage from *A*. to *C*. and *B*. And in the argument of the caſe of *Kewley* v. *Ryan*, the caſe of *Stott* v. *Vaughan* was mentioned, which was an action on a policy on the very ſame ſhip, tried before Lord *Kenyon* at *Guildhall* in Hil. Vac. 1794, in which his Lordſhip nonſuited the plaintiff, on the ground that the voyage intended was not the voyage deſcribed in the policy.

Stott v. *Vaughan*.

If the ſhip has liberty in the policy to touch at a place where it is not intended ſhe ſhall go, yet the policy will be good.

But if, for particular reaſons, a place be mentioned in the policy, where the ſhip ſhall have liberty to touch, when in fact it is not intended that ſhe ſhall touch there, but proceed directly to her port of deſtination, this will not avoid the policy; for the inſured may ſhorten the voyage, and diminiſh the riſk (*b*).—As where a ſhip was inſured from *London* to *Nantz*, *with liberty to touch at* Oſtend; and ſhe cleared out for *Oſtend* only, though it was deſigned that ſhe ſhould proceed immediately to *Nantz*, with bills of lading, purporting to be made out at *Oſtend*, as if her cargo had been ſhipped there, in order to enable the ſhippers to import *Engliſh* goods into *Nantz*, at *Oſtend* duties, and alſo to ſave the light-houſe duties going down the *Channel*.—This, being a conſtant practice, and known to all concerned in this trade, it was held to be no fraud on the underwriters; and that the policy was good.

Planché v. *Fletcher*, *Doug*. 238, *ſup*. 69.

(*a*) *Doug*. 18.—(*b*) Vid. *Emerig*. tom. 2, p. 52.

If

If, from a certain point in the voyage inſured, there be ſeveral tracks which lead to the place of deſtination, with certain advantages and diſadvantages attending each; and, at that point, the captain has uſually been at liberty to elect, according to circumſtances, which of the courſes he ſhould take. If the ſhip inſured ſail, *with orders from the inſured, to take one particular track*, in order to touch at a port in that track, this ought to be ſtated in the policy, otherwiſe it will be void; for the inſurer is intitled to the advantage of the captain's judgment in electing, at the moment he arrives at the dividing point, which of the tracks it will be beſt for the ſhip to purſue, under the then exiſting circumſtances. This point will be found determined in the following caſe.

If from a certain point in a voyage, there be ſeveral tracks, of which the captain uſually elects which he will purſue; but a particular track is *preſcribed to him* by the inſured; this ſhould be mentioned in the policy, otherwiſe it will be void.

The ſhip *Arethuſa*, was inſured, "At and from *London* "to *Jamaica*."—In an action upon this policy, for a loſs by capture, the defendant paid the premium into court, and reſiſted the demand on the ground that the policy was void, as not containing a true deſcription of the voyage intended.—On the trial, it appeared that the ſhip was cleared out for *Jamaica* only, but ſailed *with directions* to the captain to touch at *Cape Nicola Mole* in *St. Domingo*, in order to land ſome ſtores there, purſuant to a charter-party, and afterwards to proceed to *Jamaica*.—*St. Domingo* lies in the track to *Jamaica*, and conſequently the courſe from *London* to *Cape Nicola Mole* and to *Jamaica* is, to a certain point, the ſame. From that point there are three tracks which a ſhip bound to *Jamaica* may take; one immediately to the ſouthward of *St. Domingo*; another further ſouth; and a third to the northward of that iſland. In this laſt, after the ſhip had paſſed the dividing point of the three ſeveral courſes, but before ſhe had reached the ſubdividing point of the continuing courſe to *Jamaica*, and that leading into the port of *Cape Nicola Mole*, ſhe was captured. Of the three ſeveral tracks to *Jamaica*, from the dividing point, which the ſhip paſſed, it appeared that thoſe to the ſouthward of *St. Domingo*

A ſhip inſured from *A.* to *B.* ſails with directions to touch at *C.* an intermediate point. From a certain point in the voyage, there are three tracks to *B.*; one by the way of *C.*, the other two by different courſes, —and there are certain advantages and diſadvantages attending each; ſo that the captain muſt elect according to circumſtances which courſe he will purſue. The ſhip takes the track by *C.* in order to touch there, but is captured before ſhe comes to the point where ſhe muſt have turned into the track to *B.* by the way of *C.* The inſurer is diſcharged becauſe he was entitled to the advantage of the

captain's judgment in electing which of the three tracks it was beſt to purſue, when he came to the firſt dividing point,

Middlewood v. *Blake*, 7 T. R. 162.

Domingo were the moſt uſual, eſpecially in time of peace, and were the ſafeſt navigation; that the other, to the northward, was the ſhorteſt, but more difficult, navigation, but was ſometimes preferred in time of war, by thoſe who were acquainted with it, more eſpecially in this war, becauſe great part of the iſland of *St. Domingo*, including *Cape Nicola Mole*, being in poſſeſſion of the *Britiſh* forces, there was leſs riſk to be apprehended from privateers. But which of the three courſes was the moſt advantageous to be purſued, in any particular inſtance, depended upon circumſtances, upon which it was proper for the captain to exerciſe his judgment at the time. It was not pretended that the captain had in fact exerciſed any ſuch judgment, in ſelecting the courſe he had taken; it being evident that he had adopted it as the moſt direct and proper one to be taken for the purpoſe of going into *Cape Nicola Mole*, whither he was then bound.—Lord *Kenyon*, before whom the cauſe was tried, was of opinion that the defendant was diſcharged under theſe circumſtances; becauſe, at the time when the ſhip was captured, ſhe was bound to a different place from that for which ſhe was inſured; and with a view to which, the captain, under compulſion of his orders, had taken this particular track, and was not left at liberty to exerciſe his judgment at the dividing point, for the benefit of all concerned, as the inſurers had a right to inſiſt upon.—The jury accordingly found a verdict for the defendant, being, as they ſtated, unanimouſly of opinion, "that the "*concealment* (*a*) of the intention to go to *St. Domingo* "vitiated the policy."—Upon a motion for a new trial, it was inſiſted on the part of the plaintiff, that where the *termini à quo* and *ad quem* remain the ſame, an intended

(*a*) This cannot ſo properly be called a *concealment*, as a defective deſcription of the voyage in the policy. A concealment is generally underſtood to mean the withholding of ſome information material for the inſurer to know, but not neceſſary to be inſerted in the policy. But the deſcription of the voyage inſured muſt always be contained in the policy: nor do I apprehend that any *viva voce* communication would ſupply a defect in that deſcription.

deviation

deviation ſhall not vitiate the policy, if the loſs happen before the ſhip arrives at the dividing point.—The court, however, were unanimouſly of opinion, that the plaintiff was not entitled to recover.—Lord *Kenyon* ſaid, "I will not now enquire whether the caſes cited were, or were not, properly decided; though, perhaps, if this were *res integra*, I might have entertained ſome doubts. It is ſufficient that thoſe caſes have been decided, and if the opinion which I gave at the trial tended to ſhake their authority, I would abandon it: But it ſeems to me that our deciding in favour of this defendant will not diſturb any of the authorities. At the trial ſix witneſſes, who had gone many voyages to *Jamaica*, were examined on the part of the plaintiff, reſpecting the common courſe of the voyage, two of whom had never taken the northern paſſage, and the other four ſaid that the ſouthern was the moſt uſual; and that, at all events, the captain ought to exerciſe his diſcretion in each particular caſe, whether he ſhould take the one courſe or the other. When this policy was ſubſcribed, it muſt be taken for granted that the defendant knew what was the common courſe of the trade, and expected that the moſt expedient courſe would be purſued by the captain, acting on the emergency of the occaſion: But in fact that diſcretion of the captain was taken away in this inſtance, and on that I formed my opinion. That was a moſt important fact and ought to have been communicated to the underwriters." Mr. Juſtice *Aſhurſt* and Mr. Juſtice *Groſe* concurred in theſe ſentiments, both founding their opinions on the want of a full diſcloſure of the particular courſe the ſhip was to take, as being a circumſtance that might have materially varied the riſk.—Mr. Juſtice *Lawrence* ſaid,—"When the motion for a new trial was made, I was inclined to think that this caſe fell within the authority of the ſeveral caſes cited by the plaintiffs counſel; and that, as the ſhip was taken in the courſe of her voyage to *Jamaica*, without ſtopping at *St. Domingo*, the plaintiff was entitled to recover: But, in the courſe of this diſcuſſion, I have changed my opinion. The principle on which theſe caſes have

have been determined is, that when the ſhip is taken before ſhe comes to the dividing point, the underwriters run no additional riſk by the captain's intention to deviate afterwards; and therefore it is to be conſidered as if no ſuch intention had been formed. Now if, in this caſe, the ſhip had been captured before ſhe took the northern courſe, I ſhould have thought that the plaintiff would have been entitled to recover; for, in that caſe, the ſhip would have run no additional riſk: But here ſhe ſailed for *Jamaica*, having a charter-party to ſtop at *St. Domingo*; and when ſhe came to the dividing point, which I conſider, in this caſe, to be that where ſhe begun to take the northern courſe, the ſhip was ſubjected to a riſk for which the underwriters did not make themſelves reſponſible; for at that moment, they were intitled to have the benefit of the captain's judgment, whether he would go to the north or to the ſouth. If it had appeared that the captain had really exerciſed his judgment, and had taken the northern courſe, as in his opinion, the beſt, at that time, without being influenced by the charter-party to go to *St. Domingo*, I ſhould have thought that a new trial ought to be granted: But I underſtand that he took this courſe, not after exerciſing his judgment, but becauſe he was bound to go to *Cape Nicola Mole*; and, therefore, there is no ground for ſending this caſe to a new trial, though the jury have decided for the plaintiff on another ground which, in my opinion, is not tenable *(a)*."

5. *The Perils inſured againſt.*

The various perils againſt which the inſured means to be protected, muſt be diſtinctly enumerated in the policy.

(*a*) The ground on which the jury decided was, that the not diſcloſing to the underwriters the neceſſity of the ſhip's going to *Cape Nicola Mole*, was a concealment which vitiated the policy (vid. Sup. 234.). That ground ſeems to be the principal foundation of the opinions delivered by the other three

licy. Theſe are generally expreſſed in a form of words which has been long in uſe; and being dictated by the anxiety which is natural to perſons who have great objects at ſtake, have been ſo multiplied, and are now ſo comprehenſive, that they afford full protection againſt every accident or misfortune that can poſſibly happen in the courſe of any voyage, and for which it is meant that the inſurer ſhall be anſwerable.

There are, however, as we have already ſeen, certain loſſes for which it is never meant that the inſurer ſhall be anſwerable, being imputable to the owners of the ſhip, or to the maſter and mariners whom they employ, rather than to the perils of the ſea. Such are injuries occaſioned to goods by bad ſtowage, by being expoſed to wet, by theft, and embezzlement of the maſter or mariners, &c.

There are certain loſſes which are not comprehended in the uſual words of the policy. Vid. ſup. ch. 5, § 4.

In all our policies are inſerted the words, '*loſt or not loſt*,' by which the inſurer takes upon himſelf, not only the riſk of future loſs, but alſo the loſs, if any, that may already have happened. It is ſaid (*a*), that this clauſe is peculiar to *Engliſh* policies. But the ſame thing is expreſſed in the *French* policies by the words, "*ſur* "*bonnes ou mauvaiſes nouvelles* (*b*).

The clauſe '*loſt, or not loſt*,' is always ſerted in our policies.

It is not peculiar to *Engliſh* policies.

This clauſe, it is probable, was originally inſerted in policies, only in caſes where there was reaſon to fear that a loſs had already happened; and in ſuch caſes the inſertion of it neceſſarily induced the payment of a higher premium. But it has long been inſerted in every

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three judges. And indeed it would ſeem that the voyage intended was not the voyage inſured. Vid. ſup. 232, where the difference between an *intended deviation*, and a *different voyage* is ſhewn. In this caſe the defendant paid the premium into court, which plainly ſhews that he, or thoſe who conducted his defence, meant to reſiſt the plaintiff's claim, on the ground that the policy was void in its original; and not on that of a *deviation*, which only diſcharges the inſurers from the time it takes place, but does not intitle the inſured to a return of premium. —(*a*) *Park*, 25, 5 *Bur.* 2803.—(*b*) Vid. *Emerig.* tom. 2, p. 143.

policy,

policy, as a matter of courſe. The reaſon aſſigned by *Roccus* why this clauſe is thought unneceſſary, and therefore not inſerted in the policies of ſome countries, is, that the fate of the voyage being unknown, will not prejudice the inſurance (*a*).

Policies with this clauſe are not deemed wagers.

Natural law would require that the ſubject matter of an inſurance, like that of a ſale, ſhould exiſt at the time of the contract: But municipal law adds, that although the thing inſured may poſſibly no longer exiſt, but that it had periſhed before the contract was made, yet unleſs the inſured or his agents knew this, at the time the contract was made, the thing inſured is, by a ſort of fiction of law, founded on the good faith of the inſured, ſuppoſed ſtill to exiſt, ſo as to be a proper ſubject of inſurance, and not to be conſidered as loſt till intelligence of the loſs arrives. The inſurance, in ſuch caſe, is made, as it were *nunc pro tunc*. The contract is preſumed to have had its exiſtence while the ſubject matter of it was in being, and before the time when the riſk commenced. Upon this ground, and from the neceſſity of the caſe, policies, with this clauſe, are deemed legal contracts, and not wagers; nor can they, when rightly underſtood, be adduced as a precedent to authorize wager inſurances.

Though this clauſe is not inſerted in ſome of the foreign policies, yet it muſt, in many caſes, be neceſſarily implied in the contract, otherwiſe it would be impoſſible for the merchant to be inſured againſt riſks which are already run; and againſt which it is indiſpenſably neceſſary for his ſafety that he ſhould ſometimes be inſured. For it often happens, in the caſes of *middle voyages* in diſtant parts of the world, and in homeward voyages, that the riſk is wholly, or in part, run before any inſurance can be effected.

It does not make the contract more hazardous.

It has been ſaid, that inſurances, *loſt or not loſt*, are 'certainly very hazardous;—and that the premium is 'great in proportion (*b*)'.—Why an inſurance here is more hazardous, only becauſe it is made after the riſk has been

(*a*) *Roccus*, n. t. n. 175.—(*b*) *Park*, 25, vid. *Molloy*, 62, c. 7, § 5.

begun

begun or even ended, in a diſtant part of the world, is not very obvious. Fraud out of the caſe, it would ſeem that if there be any difference, inſtead of being the ground of an increaſe of premium, it is rather in favour of the inſurer, who may reaſonably be ſuppoſed to ſpeculate better upon the occurrences of the time paſt, even in diſtant parts of the world, than upon thoſe of the time to come. An underwriter would be better able, at leaſt in time of war, to eſtimate the riſk of a voyage from the coaſt of *Africa* to *Jamaica*, two months after it was begun, than two months before.

6. *The Powers of the inſured in caſe of Misfortune.*

It was formerly doubted whether the inſured could uſe his endeavours to recover the goods which had been loſt, or in preſerving ſuch as had been ſaved, without waving his right to abandon (*a*). To obviate this doubt, a clauſe was introduced into the policy to enable the inſured in caſe of any loſs or misfortune, to employ all neceſſary means for the defence, ſafeguard, and recovery of the goods or ſhip inſured, without prejudice to the inſurance, and at the charge of the inſurers, to which they bind themſelves to contribute in proportion to their reſpective ſubſcriptions.

7. *The Promiſe of the inſurers, and their receipt for the Premium.*

The next clauſe in the policy is that by which the inſurers bind themſelves to the inſured for the true performance of their contract, and confeſs themſelves paid the conſideration or premium, by the inſured, after the rate ſpecified.

The receipt for the premium is only to preclude the inſurers from objecting the want of conſideration.

It is true that, in practice, the premium is not always paid when the policy is underwritten. Inſurances, as has been already obſerved, are generally effected by the intervention of brokers, and open accounts are uſually kept between them and the underwriters, in which they make themſelves debtors for all premiums. Indeed it is laid down that, by the uſage of trade, the inſurer is to

(*a*) *Caſaregis*, Diſc. 3, n. 14.

look to the agent who is employed to effect the policy for his premium (*a*).

Sometimes the credit is given to the insured himself. If there be no express agreement, it would seem that the agent or broker is *prima facie* liable. Perhaps in such case an action would lie against either, unless the principal has paid the premium to the agent; in which case, the writers on this subject are of opinion that the agent is alone responsible (*b*). — But whichever is liable, the insurer may recover the premium, and *indebitatus assumpsit* will lie for it (*c*), notwithstanding the formal acknowledgement of the receipt of it in the policy, which is not inserted there as conclusive evidence of the actual payment of the premium, but to preclude the necessity of proving it in case of loss.

Indebitatus assumpsit will lie for the premium, notwithstanding the receipt of the insurer.

The payment or non-payment of the premium, therefore can have no effect upon the insurance. Every insurer may insist on being paid the premium before he subscribes the policy; but having once subscribed it, and given credit for the premium, no matter to whom, he shall not afterwards be at liberty, when a loss has happened, to object the want of consideration for his promise.

The non-payment of the premium cannot affect the validity of the contract.

There is no fixed rule to ascertain the rate of the premium in any case. This must always depend on the agreement of the parties; and therefore the premium, whatever it may be, is always reputed to be just and fair, if there be no fraud or surprize on either side. If the nature of the risk be fairly and fully declared by the insured, the insurer can never dispute the payment of a loss, on the ground of the smallness of the premium (*d*).

8. *The common Memorandum.*

This memorandum next follows, for the purpose of confining insurances to their only proper object, namely,

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(*a*) *Valin*, art. 3, h. t. p. 32. *Pothier*, n. 98. *Emerig.* tom. 1, p. 139.—(*b*) Vid *Savary*, liv. 3, c. 2. *Emerig.* tom. 1, p. 148. —(*c*) R. *Jackson* v. *Colegrave*, Carth. 338.—(*d*) Vid. *Emerig.* tom. 1, p. 69.

an indemnity againſt real and important loſſes ariſing from the perils of the ſea, and to obviate all ſubjects of litigation about trivial loſſes, and loſſes ariſing from the periſhable quality of the goods inſured. For this purpoſe, it is now, by this memorandum, conſtantly ſtipulated in all our policies, that in the caſe of certain enumerated articles, of a quality peculiarly periſhable, the inſurer ſhall not be anſwerable for any partial loſs whatever; that, in the caſe of certain others, liable to partial injuries, but leſs difficult to be preſerved at ſea, he ſhall only be liable for partial loſſes above five *per cent.*; and that, as to all other goods, and alſo the ſhip and freight, he ſhall only be liable for partial loſſes above three *per cent.* But there is an exception in this memorandum of all loſſes, however ſmall, of the nature of *general average*; or where the ſhip is ſtranded: But this laſt exception is only found in the policies of private underwriters (*a*).

9. *The Date and Subſcription.*

The ſum inſured is, generally placed after the ſignature, in the underwriter's hand-writing, and in words at length, not in figures which are eaſily altered or changed. But it is not indiſpenſably neceſſary that the ſum ſhall be ſpecified in the policy. An inſurer may bind himſelf to pay the value of the effects inſured, or a given proportion of it, without fixing that value in the policy (*b*).

A policy of inſurance, like every other contract in writing, ſhould have a date. There are few inſtruments to which the true date is more neceſſary. This date, when compared with the dates of facts connected with the tranſaction, ſerves to diſcover whether there be reaſon to ſuſpect any fraudulent concealment, at the time of any of the ſubſcriptions to the policy.

The date is not inſerted in the body of the policy. For, as each ſubſcription to a policy makes a diſtinct contract,

Each underwriter puts the date to his ſubſcription.

(*a*) Vid. ſup. c. 6, § 3, where the ſubject of this memorandum is fully conſidered.—(*b*) Vid. *Pothier*, h. t. n. 75. *Emerig.* tom. 1, p. 57.

each underwriter ſets down the day, month, and year of his own ſubſcription.

Practice in *France.*

This practice is preferable to that which prevails in *France*, where the firſt underwriter puts a date after his ſignature, and the reſt ſubſcribe without adding any date. At length the notary or broker cloſes the policy with the date of the firſt ſubſcription. This practice, as *Emerigon* juſtly obſerves, muſt afford frequent temptations to fraud; and he laments, that though great endeavours had been uſed to introduce the *Engliſh* practice, this had been without effect (*a*).

10. *The Stamp.*

The laſt requiſite of the policy is that it be duly ſtamped.—Upon the ſubject of the ſtamp duties impoſed on this contract, it will be only neceſſary to inſert here the ſubſtance of the ſtat. 35 *G.* III. c. 63, and this will be done the more fully, becauſe it contains many regulations with which it behoves every perſon concerned in the buſineſs of marine inſurances to be well acquainted.

This act, which is declared not to extend to inſurances on lives, or againſt loſſes by fire (*b*), and repeals all former ſtamp duties on marine inſurances (*c*), impoſes 'On 'every policy of inſurance upon any ſhip, goods, or mer-'chandizes, or upon other property, the following duties, 'viz.—Where the ſum inſured amounts to 100 l. a ſtamp 'duty of 2 s. 6 d. and ſo progreſſively for every ſum of '100 l. inſured: And where the ſum inſured is leſs than '100 l. the like ſtamp of 2 s. 6 d.: And where it exceeds '100 l. or any progreſſive ſums of 100 l. each, by a frac-'tional part of 100 l. a like duty of 2 s. 6 d. for every 'ſuch fractional part: And where the premium *bonâ fide* 'paid, or contracted for, ſhall not exceed the rate of 10 s. 'and the ſum inſured amounts to 100 l. a duty of 1 s. 3 d. 'and ſo progreſſively for every 100 l. and the fractional 'part of every 100 l. inſured (*d*).

§ 1. A ſtamp duty of 2 s. 6 d. for every 100 l. inſured, and 2 s. 6 d. for every fractional part of 100 l. is impoſed on marine policies.

But where the premium does not exceed 10 s. *per cent.* the duty ſhall be only 1 s. 3 d. *per cent.*

(*a*) Vid. *Emerig.* tom. 1. p. 47.—(*b*) Sect. 2.—(*c*) Sect. 24.—(*d*) By 41 *G.* III. c. 10, all theſe duties are doubled. Vid. inf. 245.

'Pro-

'Provided that where the premium ſhall not exceed 10 *s.* 'per *cent.* and the ſum inſured amounts to 200 *l.* or upwards, a ſtamp of 2 *s.* 6 *d.* may be uſed for every '200 *l.* inſured, inſtead of ſtamps of 1 *s.* 3 *d.* for every '100 *l.*'

§ 4. In ſuch caſe, the ſtamp may be 2 *s.* 6 *d.* for 200 *l.*

'Provided that where an inſurance is made on goods 'on board a ſhip ſpecifically named, on a homeward 'voyage, and the ſum inſured is found to exceed the in-'tereſt by 1000 *l.* or upwards, where the duty is 1 *s.* 3 *d.* '*per cent.* or 500 *l.* where it is 2 *s.* 6 *d.* and upon oath 'of the true value of the intereſt, and on production 'of the policy within a month after landing the goods in '*Great Britain;* and on proof of the return of premium 'by the ſeveral underwriters, on account of ſuch ſhort 'intereſt, the commiſſioners may allow for the exceſs of 'duty, provided the policy be delivered to the commiſ-'ſioners to be cancelled, and the intereſt inſured be not 'valued from the policy.'

§ 10. Where the ſum inſured on homeward voyages exceeds the intereſt of the inſured by 1000 *l.* where the ſtamp is 1 *s* 3 *d.* *per cent.* or 500 *l.* where it is 2 *s.* 6 *d.* the exceſs of duty may be allowed.

'And every contract for any ſuch inſurance ſhall be 'printed or written, and ſhall be deemed a *policy of inſur-'ance*, in which the premium, the riſk inſured againſt, 'the names of the underwriters, and the ſums inſured, 'ſhall be ſpecified, in default whereof, every ſuch in-'ſurance ſhall be void.'

§ 11. Every contract ſhall be deemed a policy which ſhews the premium, riſk, ſum inſured, and names of inſurers.

'And no policy upon any ſhip, or ſhare therein, ſhall 'be made for any certain term longer than 12 calendar 'months; and every policy for a longer term ſhall be 'void.'

§ 12. No policy upon a ſhip to be for a longer term than 12 months.

'And no ſuch inſurance, made in *Great Britain*, ſhall be 'given in evidence, or ſhall be good or available in law, 'unleſs ſtamped with the ſtamp to denote the rate of 'duty, or ſome higher duty, contained in this act; and 'it ſhall not be lawful to ſtamp any policy, after the in-'ſurance ſhall be printed or written, under any pretence 'whatſoever.'

§ 14. No ſuch inſurance ſhall be available in law unleſs duly ſtamped, and no policy to be ſtamped after written or printed.

'And every perſon who ſhall make or effect, or pro-'cure to be made or effected, any ſuch inſurance, or ſhall 'pay, or agree to pay, any premium thereon, or ſhall 'enter into any contract for ſuch inſurance, unleſs it be

§ 15. Any perſon effecting ſuch inſurance, or paying an premium, or contracting for ſuch inſurance,

unleſs duly ſtamped, ſhall forfeit 500 l.

Brokers negotiating ſuch inſurances to forfeit 500 l.

§ 16. And they ſhall not charge their brokerage.

§ 17. Any perſon inſuring without a ſtamp, or concerned in any fraud to evade the ſtamp duties, to forfeit 500 l.

§ 18. But the two inſurance companies may make agreements for inſurances on unſtamped labels, provided the policies be made out in 3 days after.

§ 13. Any alteration may be made in the policy, before notice of the end of the riſk, if the premium exceed 10 s. *per cent.*

'printed or written, being firſt duly ſtamped with the proper 'ſtamp, or one of higher value, ſhall forfeit 500 l.; and 'all brokers, agents, &c. negotiating ſuch inſurance, or 'printing or writing any agreement for ſuch inſurance 'before the ſame be duly ſtamped, ſhall alſo forfeit 500 l.

'And it ſhall not be lawful for any broker, &c. negotiat- 'ing ſuch inſurance, to charge for brokerage, &c. or for 'any premium paid thereon, unleſs the ſame be printed or 'written and duly ſtamped; and every ſum ſo paid ſhall 'be deemed to be paid without conſideration.'

'And any inſurer or underwriter, who ſhall receive 'any premium, or pay any loſs, upon ſuch inſurance, unleſs 'it be written or printed and duly ſtamped; or any perſon 'who ſhall be concerned in any fraudulent device to evade 'the duties impoſed by this act, ſhall forfeit for every 'offence 500 l.'

'But it being cuſtomary for the *London Aſſurance*, and '*Royal Exchange Aſſurance* Companies, to prepare a label, 'containing the heads of the inſurance propoſed, ſigned by 'the inſured, from which the policies are afterwards made; 'and it would be inconvenient to require the policies in 'all caſes to be immediately made out, it is provided, 'that the officers of thoſe corporations ſhall not be ſubject 'to any of the above penalties for making any agreement to 'inſure by ſuch unſtamped label, provided the day on 'which it was made be truly expreſſed in words at length, 'and a policy be made out in purſuance of the agreement, 'and according to one of the forms annexed to this 'act (*a*), and duly executed and ſtamped within three 'office days from the date of the agreement.'

'Provided that any lawful alteration in the terms of 'the policy may be made after it has been underwritten, 'and that no additional ſtamp be required by reaſon of 'ſuch alteration; ſo that it be made before notice of the 'determination of the riſk originally inſured, that the 'original premium exceed 10 s. *per cent.* that the pro-

(*a*) Vid. Appendix, No. I. II. III.

'perty

'perty of the thing insured remain the same, that the 'alteration shall not prolong the term insured beyond 'the period allowed, and that no additional sum shall be 'insured by such alteration.'

This act also contains regulations for the providing paper, &c. at the public charge, and the distributing of stamped policies, where the sum insured is not under 10,000 l.—and for stamping paper, &c. brought to the office;—for appointing an office in *London* near the *Royal Exchange* to distribute policies properly stamped;—directing the mode of taking bonds from persons to whom policies are delivered on credit, and keeping proper accounts with them;—with directions for granting new policies in lieu of policies damaged; or where, by mistake, a wrong stamp has been used, or subscriptions have not been obtained to the amount of the stamp, on producing another policy made out for the same risk, provided it be brought to be cancelled in ten office days after the date of the subscription, or (if on an outward voyage) after the ship has sailed. Further regulations.

By the stat. 41 *G.* III. c. 10, § 1, all the duties imposed by the above act are doubled. By the 41 *G.* III. c. 10, the above duties are doubled.

Sect. 4.

When a Policy may be altered or corrected.

THOUGH a policy of insurance, not being under seal, is but a simple contract, yet, it is always looked upon as an instrument of great solemnity, being the only evidence of a contract of the utmost importance to the parties interested. The general form of the policy, which has been for many ages nearly the same, is never altered, but with the utmost caution, and upon very great consideration (*a*); and therefore, when once a policy has been filled up and underwritten, no alteration can be made in it, but by the consent of all parties, or by the authority of a court of equity, or perhaps a court of law, and then only in a case where something has, by A policy is never altered but by consent of parties, or the authority of the court.

(*a*) Vid. 1 *Skin.* 54.

miſtake or fraud, been inſerted or omitted, contrary to the manifeſt intention and the real agreement of the parties. And a very clear caſe of this ſort muſt be made out by unqueſtionable teſtimony to warrant ſuch alteration.

But where a clear caſe is made out, the court will direct the alteration to be made.

But, the following caſes will ſhew, that where ſuch a caſe is made out, the court will direct the alteration to be made, even after a loſs has happened.

This may be done, even after a loſs has happened. But then it muſt clearly appear, 1ſt. To be contrary to the intent; and 2dly, to be a proper caſe for the court to interpoſe.

An inſurance was made on a ſhip, "At and from "*London* to *Oſtend*, from thence to *Rotterdam*, from thence "to the *Canaries*; warranted an *Oſtend* ſhip."—The ſhip was taken. The inſured brought his bill to have the policy rectified, according to the intention of the parties; by ſtating the voyage from *Oſtend* only, and not from *London*. —The evidence in ſupport of the plaintiff's caſe appearing to be contradictory, his bill was diſmiſſed. Lord Chancellor *Hardwicke*, in delivering his opinion, ſaid,—"No doubt but this court has juriſdiction to relieve, in reſpect to a plain miſtake in contracts, if reduced into writing contrary to the intent of the parties. And though the plaintiff comes to do this in a very harſh caſe; namely, upon a policy, after a loſs has happened, to vary the contract ſo as to turn the loſs on that inſurer, who otherwiſe, it is admitted, cannot be charged; yet if the caſe be ſo ſtrong as to require it, the court ought to do it. The *firſt* queſtion is, whether it ſufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement of the parties; and *ſecondly*, ſuppoſing it ſo, whether this be ſuch a caſe, under the circumſtances of it, and the nature of the trade, as that the court ought to interpoſe and relieve."

Henkle v. *Roy. Ex. Aſſ.* 1 Vez. 317.

Where the inſtructions were to make a policy to commence from the ſhip's *arrival* at *A.* and the policy was made from the ſhip's *departure* from *A.* a court of equity

So where a policy ſtated that the adventure was to commence from the *departure* of the ſhip *Eyles* from *Fort St. George* to *London*;—upon a bill filed by the inſured it appeared that the owner had directed an inſurance to be made, "to commence from the ſhip's *arrival* at *Fort St. George*;" that a label, agreeably to theſe inſtructions, had been entered in a book, and ſigned by the agent and two of the directors of the *London Aſſurance*, and that, by miſtake, the

the policy was made out different from the label. The loſs happened *after* the ſhip's arrival at *Fort St. George.*—Lord Chancellor *Hardwicke* determined that the label which contained the names of the ſhip and of the maſter, the premium, and a deſcription of the voyage, was a memorandum of the agreement, in which the material parts of the policy were inſerted; that though the policy was ambiguous, yet the label made it clear; and as it was only the miſtake of the clerk, it ought to be rectified according to the label.

ordered it to be altered.

Motteux v. *Lond. Aſſur.* 1 *Atk.* 545.

When an underwriter agrees to alter the policy in order to correct a miſtake, he ſhall not afterwards object that he ought to have had an increaſe of premium.

An underwriter having agreed to alter a policy ſhall not afterwards be permitted to object that he ought to have had an increaſe of *premium.*

Thus, where an agent had inſtructions to procure an inſurance on goods on board the *Mary* galley, Captain *Hill.*—The agent carried the letter to one *Stubbs*, a broker, and he, by miſtake, made the inſurance on the *Mary*, Captain *Hazlewood.* The *Mary* galley was loſt; and then *Stubbs* applied to the underwriters to conſent to alter the policy; to which they agreed, and the miſtake was rectified.—It was objected at the trial, that, on account of the alteration, the inſurers ſhould have had an increaſe of *premium*, the ſhip *Mary* being a ſtouter veſſel than the *Mary* galley; but, Lord C. J. *Holt* ruled, that the action would lie upon the policy, that the miſtake might be ſet right, and that *Stubbs* was a good witneſs: And he cited a caſe which happened in the time of Lord C. J. *Pemberton*, where an inſurance was made from *Archangel* to the *Downs*, and from thence to *Leghorn*; but there was a parol agreement at the ſame time, that the policy ſhould not commence till the ſhip came to ſuch a place; and it was held the parol agreement ſhould avoid the writing.

Bates v. *Graham, Salk.* 444.

Even a partial agreement ſhall control the written policy.

CHAP. VIII.

Of Warranties.

HAVING, in the foregoing chapter, ſhewn the nature and properties of the common policy, we now proceed, according to the diſtribution of our ſubject, to treat of thoſe occaſional ſtipulations and agreements by which the general tenor of the contract, as expreſſed in the common policy, is qualified and regulated. Of theſe the moſt important are warranties, which will be now treated of under the following heads, viz.

1. Of the nature and different kinds of warranties; and the effect of the breach of a warranty.
2. How an expreſs warranty ſhall be made.
3. Of the warranty to ſail by a given time.
4. Of the warranty to ſail with convoy.
5. Of the warranty of neutrality.

Sect. 1.

Of the nature and different kinds of Warranties; and the effect of the breach of a Warranty.

Warranty defined.

A warranty is a ſtipulation or agreement on the part of the inſured, in nature of a condition precedent.—It

It may be either affirmative or promiſſory.

may be either *affirmative*, as where the inſured undertakes for the truth of ſome poſitive allegation; as, that the thing inſured is neutral property, that the ſhip is of ſuch a force, that ſhe ſailed, or was well, on ſuch a day, &c.: Or, it may be *promiſſory*; as, where the inſured undertakes to perform ſome executory ſtipulation; as that a ſhip ſhall ſail on or before a given day; that ſhe ſhall depart with convoy; that ſhe ſhall be manned with ſuch a complement of men, &c.

Warranties

Warranties are either *expreſs* or *implied*. An expreſs warranty is a particular ſtipulation introduced into the written contract by the agreement of the parties; as that the thing inſured is neutral property, that the ſhip ſhall ſail by a given day, that ſhe ſhall depart with convoy, &c. An implied warranty is that which neceſſarily reſults from the nature of the contract; as that the ſhip ſhall be ſea-worthy when ſhe ſails on the voyage inſured; that ſhe ſhall be navigated with reaſonable ſkill and care, that the voyage is lawful, and ſhall be performed according to law, and in the uſual courſe, and without wilful deviation, &c. We will confine ourſelves in the preſent chapter to the ſubject of expreſs warranties. The implied warranties of greateſt moment will be treated of in the 11th and 12th chapters of the preſent book.

It may be either expreſs or implied.

A warranty, like every other part of the contract, is to be conſtrued according to the underſtanding of merchants, and does not bind the inſured beyond the commercial import of the words.

It is conſtrued according to its commercial import.

Therefore, where there was a warranty that a ſhip ſhould have 20 guns, and it appeared that ſhe had in truth 22 guns, but only 25 men, which number is far ſhort of the neceſſary complement for 20 guns; in an action on the policy it was objected that this warranty implied a competent number of men to work 20 guns, in caſe the ſhip ſhould be attacked.—But it was determined that the warranty did not include any thing not neceſſarily implied in it. Lord *Mansfield* ſaid,—"If a warranty be meant to miſlead, it is a fraud, as much as a falſe repreſentation. In this caſe there is no ground to impute fraud, and therefore the plaintiff is entitled to recover."

Hyde v. *Bruce*, B. R. Hil. 23, *G.* III. MS.

A warranty being in the nature of a condition precedent, and therefore to be performed by the inſured before he can demand performance of the contract on the part of the inſurer, it is quite immaterial for what purpoſe, or with what view, it is made; or whether the inſured had any view at all in making it: But, being once inſerted in the policy, it becomes a binding condition on the inſured; and unleſs he can ſhew that it has been literally

It muſt be literally complied with.

literally fulfilled, he can derive no benefit from the policy. The very meaning of a warranty is, to preclude all queſtion whether it has been ſubſtantially complied with or not. If it be affirmative, it muſt be literally true; if promiſſory, it muſt be ſtrictly performed.

The breach of it avoids the contract *ab initio*.

The breach of a warranty, therefore, conſiſts either in the falſehood of an affirmative, or the non-performance of an executory, ſtipulation. In either caſe, the contract is void *ab initio*, the warranty being a condition precedent: And whether the thing warranted was material or not; whether the breach of it proceeded from fraud, negligence, miſinformation, or any other cauſe, the conſequence is the ſame. The warranty makes the contract hypothetical; that is, it ſhall be binding, *if* the warranty be complied with. With reſpect to the compliance with warranties, there is no latitude, no equity; the only queſtion is, has the thing warranted taken place or not. If it has not, the inſurer is not anſwerable for any loſs, even though it did not happen in conſequence of the breach of the warranty (*a*). This will appear in the following caſe.

And whatever it may be, or whether a loſs proceed from the breach of it or not, the inſurer is not liable.

A ſhip is warranted to ſail on her *outward voyage*, with 50 hands; but, in fact, ſhe ſails with only 46.—This avoids the policy on her *middle voyage*, though during that voyage ſhe has 52 hands.

DeHahn v. *Hartley*, 1 T.R. 343.

In *June* 1779 an inſurance was made on a ſhip and cargo, 'At and from *Africa* to her port or ports of diſcharge in the *Weſt Indies*;' and in the margin of the policy was written this warranty; "Sailed from *Liverpool* with 14 ſix pounders, ſwivels, ſmall-arms, and 50 "hands or upwards, copper-ſheathed."—The ſhip had ſailed from *Liverpool* in *October* 1778, having then only 46 hands on board, and arrived in *Beaumaris* in ſix hours after. She there took in ſix hands more, and, from that time till the capture, had 52 on board. It was found that in her voyage from *Liverpool* to *Beaumaris* ſhe was equally ſafe as if ſhe had had 50 hands on board: The ſhip being captured, and the plaintiff, not knowing that the ſhip had ſailed from *Liverpool* with only 46 hands on board, paid his ſubſcription: But on learning that fact, he brought an action againſt the inſured

(*a*) Vid. *Hibbert* v. *Pigou*, inf. 272.

to

to recover back this money thus paid in his own wrong.—It was contended on the part of the defendant, that this representation had no relation to the voyage insured, which was from *Africa* to the *West Indies*, but only a representation of the state of the ship at *Liverpool*, before she sailed from thence, and was antecedent to the voyage insured.—But the court determined that this was a warranty, and a condition that the ship had sailed from *Liverpool* with a certain number of men; and this not being true, the policy was void.—This judgment was afterwards affirmed in the *Exchequer Chamber*.

To whatever cause the non-compliance is attributable, the contract is void.

It is also immaterial to what cause the non-compliance is attributable: For if it be not in fact complied with, though, perhaps, for the best reasons, the policy is void: The condition has not been performed, or the contingency has not happened, on which the contract was made; and the underwriter has a right to say that there is no contract. Therefore, if a ship be warranted to sail on or before a given day, and she be prevented by any accident, as the sudden want of repair, the appearance of an enemy, &c. from sailing till the next day; though it may be right, in such case, not to sail on the day, yet the warranty is not complied with, and there is an end of the policy (*a*).

Sect. 2.

How an express Warranty shall be made.

A warranty must appear on the face of the policy.

AN express warranty, being of the nature of a condition precedent, our courts have held that it must appear upon the face of the policy, in order that there may be indisputable and unequivocal evidence of a stipulation, the non-compliance with which must necessarily avoid the contract. Instructions in writing for effecting

(*a*) Per Lord *Mansfield* in *Bond* v. *Nutt*, *Coup.* 606, 7. inf. 255.

the

the policy, therefore, unleſs inſerted in the inſtrument itſelf, do not amount to a warranty (*a*).

A paper wrapped up in the policy will not make a warranty.

Pawſon v. *Barnevelt*, at N. P. *Doug.* 12, n.

As, where a written paper of inſtructions, relating to the force of the ſhip, with theſe words, 'twelve *guns and* 'twenty *men*,' was wrapped up in the policy, when brought to the underwriters to be ſubſcribed; and evidence was offered to prove that a written memorandum incloſed in the policy, was always, among merchants, conſidered as a part of the policy.—Lord *Mansfield* held that, whether this was or was not a part of the policy, was a queſtion of law, and therefore ſuch evidence could not be received; and that a written paper, by being folded up in the policy, did not become a warranty.

Even a paper wafered to the policy will not make a warranty,

Bize v. *Fletcher*, at N. P. *Doug.* 13.

So, where a ſlip of paper, deſcribing the ſtate of the ſhip, the particulars of the voyage, &c. was *wafered* to the policy, at the time of ſubſcribing:—Even this, Lord *Mansfield* held not to be a warranty, or to be conſidered as a part of the policy, but only as a repreſentation.

But it will be ſufficient if it be written in the margin.

But though it is eſſential to a warranty, that it appear on the face of the policy itſelf; yet it need not be written in the body of the policy: If it be written in the margin, either in the uſual way (*b*), or tranſverſely (*c*), it will be a good warranty, it being a part of the written contract when ſigned.

Yet if a policy refer to printed propoſals, they will be conſidered as a part of the policy, even though they make a condition precedent.

Yet, in the caſe of a policy againſt loſs by fire, it has been holden that the printed propoſals of the inſurance company, requiring the inſured, in caſe of loſs, to procure a certificate from the miniſter, churchwardens and other pariſhioners of the reality of the loſs and the fairneſs of the claim, are to be conſidered as part of the policy: And that the procuring ſuch a certificate is a condition precedent to the right of the inſured to recover, and cannot be diſpenſed with, even though the miniſter and churchwardens wrongfully refuſe to grant the certificate (*d*).

(*a*) Per Cur. in *Pawſon* v. *Watſon*, *Cowp.* 790. inf. c. 9. § 1. (*b*) R. *Bean* v. *Stupart*, *Doug.* 11. (*c*) Per Lord *Mansfield* at N. P. in *Kenyon* v. *Berthon*, *Doug.* 12. n. (*d*) R. *Routledge* v. *Burrell*, 1 *H. Bl.* 254, *Oldman* v. *Bewick*, 2 *H. Bl.* 577, n. *Wood* v. *Worſley*, 2 *H. Bl.* 574. 6 T. R. 701.

Sect.

Sect. 3.

Of the Warranty to ſail on or before a given day.

When there is a warranty to ſail by a given day, nothing will excuſe the non-compliance with it.

THE time of ſailing in moſt voyages is ſo material, that, in many policies, there is a warranty to ſail on or before a certain day. Independently of the effect which a difference of ſeaſons may have upon the riſk, and of the neceſſity there is that the voyage ſhall end in a reaſonable time, it is of great importance to the inſurer, where the policy is '*at and from*' a place, that there be a day fixed for the ſhip's departure, in order that the duration of the riſk, *at* the place, may be aſcertained.—This, like every other warranty, muſt be ſtrictly performed; and the following deciſion will ſhew that nothing,—not even a detention by the authority of government, will excuſe the non-performance of it (*a*).

Even an embargo by a *Britiſh* governor will not excuſe it.

Hore v. *Whitmore*, Cowp. 784.

A ſhip was inſured, "At and from *Jamaica* to *London*, "*warranted to ſail on or before the 26th of July* 1776." —In an action on the policy, the declaration ſtated that the ſhip was ready to ſail, and would have ſailed, on the 25th of *July*, *if ſhe had not been reſtrained by the order of the governor of Jamaica*, and detained beyond the day; that ſhe afterwards ſailed and was captured. There was a verdict for the plaintiff.—Upon a motion to ſet aſide this verdict, and enter a nonſuit, it was contended on the part of the plaintiff, that the embargo by which the ſhip was prevented from ſailing on the day mentioned in the warranty, came expreſsly within the meaning of the uſual clauſe againſt the detention of rulers and princes, and therefore excuſed the delay.—But the court determined that the loſs could, in no reſpect, be connected with the embargo. That the warranty was *poſitive and expreſs*, that the ſhip ſhould depart on or before the day appointed, and therefore muſt be complied with.

(*a*) Vid. *Roccus*, n. 38.

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An irreſiſtable force, though one of the perils inſured againſt, will not excuſe the non-compliance with a warranty.

The detention, in this caſe, was one of the perils inſured againſt; and for which, while it laſted, the inſured might have abandoned. But inſtead of that, the ſhip ſails after the day ſtipulated by the warranty, and being taken, the inſured claims as for a loſs by *capture*, and alledges the detention by way of excuſe for the non-compliance with the warranty. The court, in deciding that, by reaſon of this non-compliance, the plaintiff could not recover for a loſs by capture, in effect decided that an irreſiſtable force, though one of the perils inſured againſt, would not excuſe the non-compliance with the warranty, ſo as to enable the inſured to recover for a loſs which happened after the day.

A warranty to ſail *after* a certain day muſt be obſerved with the ſame ſtrictneſs.

It may, in ſome caſes, vary the riſk materially, that the voyage ſhould not be commenced till after a certain ſeaſon be paſt. Sometimes, therefore, the warranty is to ſail *after* a certain day, and, before another day; and the following caſe will ſhew, that this muſt be complied with as ſtrictly as the warranty, to ſail *on or before* a given day.

A ſhip warranted to ſail from *Martinico after* a certain day, ſails for *Guadaloupe* before the day, intending to return to *Martinico*; but finding a full cargo at *Guadaloupe*, ſhe proceeds on her voyage.—This is a breach of the warranty.

Vizjan v. *Grant*, at N. P. Eaſt. 1779. *Park* 326.

An inſurance was made on goods on board a *French* ſhip, "At and from *Martinico* to *Havre de Grace*, with "liberty to touch at *Guadaloupe*, warranted to ſail *after* "*the 12th of January*, and on or before the firſt of *Auguſt* "1778."—At the time the inſurance was made, it was not known whether the ſhip would load at *Martinico* or *Guadaloupe*, the inſured having goods to come from both places; the policy was therefore intended to cover the riſk from both or either.—The ſhip ſailed from *Martinico* the 6th of *November* for *Guadaloupe*, where ſhe took in her whole lading, without returning to *Martinico*, as ſhe intended to have done had ſhe not got a complete cargo at *Guadaloupe*.—From thence ſhe ſailed for *Havre de Grace* on the 26th of *June* 1778, and was captured on the 3d of *September*.—In an action to recover for this loſs, it was objected by the defendant, that, according to the words of the policy, the voyage was to commence from *Martinico*, and not from *Guadaloupe*, and that the warranty of the time of ſailing was not complied with; the

ſhip

ſhip having ſailed from *Martinico before* the 12th of *January* 1778, to wit, on the 6th of *November* 1777. Mr. Juſtice *Buller*, who tried the cauſe, was of this opinion, and the jury, under his direction, found a verdict for the defendant.

If the ſhip ſail before the day to join convoy, this ſhall be a compliance with the warranty, though the way to the place of rendezvous be out of the courſe of the voyage.

But if a ſhip ſail before the day, from the port of loading in one of the *Weſt India* iſlands, with all her cargo and clearances on board, to the uſual place of rendezvous, at another part of the ſame iſland, merely for the ſake of joining convoy: This is a compliance with the warranty, though the ſhip be detained at the place of rendezvous beyond the day. The reaſon is, that when a ſhip clears out for her port of loading, with a complete cargo, and has no other object in view but the ſafeſt mode of ſailing to her port of delivery, her voyage muſt be ſaid to commence from her departure from that port. If, indeed, her cargo was not complete, at the time ſhe ſailed, it would not have been a commencement of the voyage. This will be found decided upon great conſideration in the following caſe.

A ſhip is warranted to ſail from *Jamaica* to *London, on or before a given day*; and before the day ſhe ſails from *St. Anne's* to *Bluefields*, to join convoy, and is there ſtopped by an embargo till after the day. Though *Bluefields* is out of her courſe,—yet, as ſhe went there only for convoy, this is a ſailing on her voyage before the 1ſt of *Auguſt*.

An inſurance was made on a ſhip, loſt or not loſt; "At and from *Jamaica* to *London; warranted to have "ſailed on or before the firſt of Auguſt* 1776."—The ſhip was completely laden at *St. Anne's* in *Jamaica*, and ſailed from thence on the 26th of *July* for *Bluefields*, in order to join the convoy there, that being the general rendezvous for convoy on the *Jamaica* ſtation, and where a convoy then lay expecting to ſail for *England* every day: But the greater part of the way from *St. Anne's* to *Bluefields* is out of the courſe from thence to *England*. On the ſhip's arrival at *Bluefields*, ſhe was ſtopped by an embargo laid on all veſſels at *Jamaica*, and detained there till the 6th of *Auguſt*, when ſhe ſailed, and was afterwards taken.—Upon theſe facts the jury found a verdict for the defendant, under the direction of Lord *Mansfield*, who tried the cauſe.—Upon a motion for a new trial, two points were made for the defendant.—1ſt. That the departure from *St. Anne's* was not a departure from *Jamaica*. 2dly. If it was, that the going to *Bluefields*, though for the purpoſe of convoy only, was a deviation, being out

Bond v. *Nutt*, *Cowp.* 601.

out of the courſe of the voyage.—Lord *Mansfield* at firſt ſeemed deſirous to know whether there were any authorities to ſhew that going out of the courſe of the voyage, *for the purpoſe of convoy only*, was no deviation, and deſired that a ſearch might be made for ſuch authorities. None, however, were found. At length, after great conſideration, the court were clearly and unanimouſly of opinion in favour of the plaintiff on both points. They held, that though *Bluefields* was out of the courſe from *St. Anne*'s to *England*, yet, as the ſhip went there only to join convoy, this was a ſailing before the 1ſt of *Auguſt* and not a deviation.—Lord *Mansfield*, after acknowledging that his direction to the jury was wrong, ſaid;—"The port from whence the ſhip was to be inſured, was, if I may uſe the expreſſion, *the whole iſland*. We are all ſatisfied that the voyage from *Jamaica* to *England* began from *St. Anne*'s: That when the ſhip left that place, ſhe had no view or object but to make the beſt of her way to *England*: That every other ſhip, under the ſame circumſtances, looked upon the touching at *Bluefields* to be the ſafeſt courſe of navigation from *Jamaica* to *England*; and that any other would have been imprudent: That the ſhip ſailed from *St. Anne*'s for *England*, *by the way of Bluefields*, and not to *Bluefields* with any other view. If ſhe had gone there for any other purpoſe, as to take in water, or letters, or to wait for a convoy, none being ready, it would then have been one voyage to *Bluefields*, and another from thence to *England*. As neither party knew from what part of the iſland the ſhip would ſail, they uſed the words, "*At* and from *Jamaica*," which protected her in going from port to port till ſhe ſailed. It follows that the word *ſailed* in the warranty muſt mean, ſailed *on her homeward voyage*. The queſtion, then, is, Had ſhe or had ſhe not ſailed on or before the day? No matter what prevented her; if ſhe had not ſailed, though for the beſt reaſons, the policy would have been void. The contingency would not have happened, and there would have been no contract between the parties. If ſhe had been prevented by any accident till the 2d of *Auguſt*,

If the ſhip had gone to *Bluefields* for any other purpoſe, however neceſſary, it would have been a different voyage.

as

as by a ſudden want of repair, or the appearance of an enemy at the mouth of the port, the captain would have done very right not to ſail;—but then there would have been an end of the policy. It is very different from the caſes where a voyage has been begun; there the uſage of the voyage may juſtify going a little out of the direct courſe to join convoy, which may be reaſonable, and for the benefit of all parties. But ſtill it does not vary the fact of ſailing. Had the inſurance been *at and from*, *St. Anne*'s, the going round the iſland to *Blueſields* would have been a deviation *(a)*.

If the voyage be begun, the uſage may juſtify going out of the courſe to join convoy.

So, where an inſurance was made, "At and from "*Guadaloupe* to *Havre*, *warranted to ſail on or before the* "*31ſt of December*."—In an action on this policy, to recover for a loſs by capture, it appeared that the ſhip took in her complete loading and proviſions for *France*, and all her clearances and papers, at *Point à Pitre*, in *Guadaloupe*, and, on the 24th of *October*, ſailed from thence to *Baſſeterre*, where there is no port, but only an open road. The governor detained her there till the 10th of *January*, when ſhe ſailed with a convoy, which had arrived ſome little time before; and after ſome days, being ſeparated from the convoy, ſhe was taken.—The captain, who was the only witneſs produced at the trial, ſwore that he and the other captains of ſhips at *Point à Pitre* bound to *Europe* had notice from the governor, ſome days before ſhe ſailed from thence, that a convoy was expected at *Baſſeterre* on the 25th of *October*; that he had uſed extraordinary exertions to get ready, and though he was not able to ſail before the 24th, he was ſtill in hopes of being in time for the convoy. The laſt ſhip's paper he received at *Point à Pitre* was *le role d'équipage*, or muſter-roll, dated the 24th of *October*, which gave authority to the captain to employ the crew, conſiſting of 20 perſons, in his return to *Havre*; adding this condi-

A ſhip inſured from *Guadaloupe* to *Havre*, warranted to ſail before the 31ſt of *December*, ſails on the 24th of *October* from *Point à Pitre* to *Baſſeterre*, to join convoy, and to receive the orders of the government. She is there detained by the governor till the 10th of *January*, and then ſails with convoy, from which ſhe is ſeparated and taken.—The ſailing from *Point à Pitre* on the 24th of *Auguſt*, is a compliance with the warranty.

Thelluſon v. *Fergusſon*, Doug. 346.

(*a*) Upon the ſecond trial, the plaintiff had a verdict.—Vid. Lord *Manſfield*'s obſervations on this caſe, in *Thelluſon* v. *Staples*, *Doug.* 352. n.

tion;

tion; "*paſſant à la Baſſeterre pour y prendre les ordres du gouvernement.*" Under this was written, on the ſame paper, an account, dated the 30th of *October*, of ſome changes in the number of the crew; and under that, an entry by an officer of the marine, dated at *Baſſeterre*, the 2d of *January*, ſtating that he had examined the perſons on the roll, conſiſting of 25, including the captain,—and granting the captain permiſſion to return to *Havre*. On another paper produced by the plaintiff, called *le congé*, dated the 16th of *October*, were written at the bottom theſe words; "*Vu de relache à la Baſſeterre pour y attendre un convoi pour France. Ce 28 Octobre 1778.*" The captain ſwore he underſtood that the only reaſons for the condition inſerted in the muſter-roll, that he ſhould go to *Baſſeterre*, were, that the convoy was to be at that place, and that he might take ſuch diſpatches as were ready for *Europe*. He had not objected to it, becauſe, in the regular courſe of his voyage to *France* from *Point à Pitre*, he muſt have gone that way, to avoid *Monſſerrat*. If he had arrived in the day time, he would not have caſt anchor, but would have ſent his boat for the diſpatches; but having arrived at night, his ſhip had been detained contrary to his expectation.—On the part of the defendant, beſide the muſter-roll, and the entry under it, were read a proteſt made by the captain on his arrival at *Dover*, and a part of his depoſition in the proceedings in the admiralty. The words of the proteſt, relied on, were, "Whereupon he (the captain) waited "upon the proper officer at *Point à Pitre* for his muſter-"roll, and was by him informed that it would not be "granted, but on condition that he ſhould firſt ſail to "*Baſſeterre* and *there wait* the directions of the General "of the iſland." In a ſubſequent part he ſtates that he ſent to the ſuperintendant, and to the general, to inform them, "that the ſhip and cargo were inſured, upon "condition that ſhe ſhould depart from the iſland of "*Guadaloupe*, before the 31ſt of *December*; the terms of "which inſurance it was eſſential to fulfil. Notwith-"ſtanding which, he was refuſed permiſſion to depart,

"and

"and was kept there till after the 31ſt of *December*." The depoſition principally relied on was as follows: "At the time "the ſhip was firſt purſued and taken, ſhe was ſteering her "courſe towards *Breſt*. Her courſe was not altered upon "the appearance of the veſſel by which ſhe was taken. It "was at all times, when the weather would permit, di-"rected to *Breſt*, for which point ſhe was directed to "ſail, although her deſtination was for *Havre*, by the "ſhip's papers. She was not ſailing *beyond or* wide "of *Havre*. She was then about 8 leagues weſt of "*Uſhant*, and her courſe was not altered to any other "port, but was obliged to be directed to *Breſt*, in con-"ſequence of *the orders he had received*, ſubſequent to "the delay of the ſhip's papers.—That all the ſhip's "papers found on board were true and fair, and none of "them falſe or colourable."—At the trial the captain alſo ſwore that his father, who had formerly commanded the ſhip, at *Baſſeterre*, directed him to keep in the courſe to *Breſt*: *But this was done as the ſafeſt way, in time of war, of getting to* Havre, *which ſtill continued to be the place of the ſhip's deſtination.*—Upon this evidence the plaintiff obtained a verdict; and upon a motion for a new trial, two objections were made on the part of the defendant. 1ſt. That there had been no inception of the voyage on the 24th of *October*, nor till after the 31ſt of *December*, though it was admitted that a *bona fide* and complete inception of the voyage was ſufficient even though the force of an embargo, or any other compulſion, ſhould oblige the ſhip immediately to ſtop, or put back *(a)*.—2dly, That the ſhip never ſailed on the voyage inſured, viz. from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Breſt*.—The court determined in favour of the plaintiff on both points. Lord *Mansfield* ſaid,—"There is no contradiction between the parole evidence, and the proteſt and depoſition. Under

Under an inſurance 'at and 'from' an iſland like *Guadaloupe* or *Jamaica*, the ſhip is protected by the policy in going from port to port in the iſland.

(a) So ruled in a former caſe between the ſame parties, and in a caſe of *Earle* v. *Harris*, *Doug.* 352, n. inf. 260.

an inſurance '*at and from*' ſuch a place as *Guadaloupe* or *Jamaica*, the word, "*at*" compriſes the whole iſland, and, under that word, the ſhip is protected in going from port to port round the coaſt of the iſland: But the queſtion here is, whether the voyage was *bonâ fide* commenced, and ſtopped by accident. As to the condition about taking the orders of government, the ſhip could not ſail from any part of the iſland without the governor's leave. But the captain, when he left *Point à Pitre*, expected to meet a convoy at *Baſſeterre*, and to proceed immediately, without interruption. A convoy had been publiſhed, and he certainly would have gone to *Baſſeterre*, at any rate, independent of the clauſe in the muſter-roll. With regard to the ſecond point, the voyage to *Breſt* was, at moſt, but an intended deviation not carried into effect."—Mr. Juſtice *Buller* ſaid,—"The caſe between the ſame parties, in 1777 is in point. There was no embargo then, nor in the preſent caſe, when the ſhip ſailed. Here there was a *bonâ fide* ſailing; and the ſhip was completely ready in all reſpects."

The ſame point determined on a ſecond trial.

Thelluſſon v. *Staples*, *Doug.* 352, n.

The other underwriters on this policy, being diſſatisfied with this deciſion, another cauſe was brought to trial upon the ſame evidence.—The ſecond point was abandoned; but upon the firſt, it was inſiſted that, "To conſtitute a ſailing within the meaning of the warranty in this policy, the veſſel, at the time of ſailing from her port of loading, muſt be, in the contemplation of the captain, at abſolute and entire liberty to proceed to her port of delivery in a mathematical line, if it were poſſible."—Lord *Mansfield*, at the trial, remained of the ſame opinion as in the former caſe, and there was again a verdict for the plaintiff, to which the defendant and all the other underwriters ſubmitted without further litigation.

If an embargo be publiſhed before the ſhip ſails, and the captain puts himſelf into it, but in the hope of its being immediately taken

Lord *Mansfield*, in his charge to the jury in this laſt caſe, cited the caſe of *Earl* v. *Harris*, which he ſaid was a ſtill ſtronger caſe.—There, an embargo was actually publiſhed before the ſhip ſailed, and the captain immediately after croſſing the bar, returned to make a

proteſt, and ſent his ſhip knowingly into the embargo: But he ſwore that he expected the embargo would be taken off, and that he ſhould proceed immediately upon his voyage; and the jury believed him.

off; this will excuſe his not ſailing by the day.

Earl v. *Harris*, at N. P. Hil. Vac. 1780.—*Doug.* 352. n.

As to the queſtion, what ſhall amount to a ſailing, to ſatisfy this warranty; there can be no doubt that where a ſhip once breaks ground, and is fairly under ſail *upon her voyage*, though ſhe goes ever ſo little a way, and afterwards puts back from ſtreſs of weather, or apprehenſion of an enemy in ſight, or be then put under an embargo, and detained beyond the time of ſailing: This would ſtill be a *beginning* to ſail, and the interruption would not alter the caſe, becauſe the warranty had already been complied with (*a*).

If a ſhip once break ground, and get fairly under ſail before the day; this is a compliance with the warranty, though ſhe be drove back, by ſtreſs of weather, or detained by an embargo.

It is ſaid, that in the caſe of an inſurance, *at and from London*, warranted to depart on or before a given day, it has long been a queſtion, what ſhall be a departure from the port of *London*; or rather what is the port of *London* (*b*). But if the above doctrine of Lord *Mansfield* be well founded, it ſeems to afford a ready anſwer to this queſtion. The warranty does not require that the ſhip ſhall abſolutely leave her port of departure; but only that ſhe ſhall get under weigh *with intent to proceed on the voyage inſured.*

Sect. 4.

Of the Warranty to ſail with Convoy.

ANOTHER ſpecies of warranty often inſerted in policies in time of war, is *to ſail, or to depart, with convoy*. This, like other warranties, muſt be ſtrictly performed; and nothing will excuſe the non-performance of it. If, therefore, a ſhip, warranted to depart with convoy, ſail without convoy, the policy becomes void, *defectu conditionis*, whether this be imputable

This warranty muſt be ſtrictly performed.

And if the ſhip ſail without convoy, from whatever cauſe, the policy will be void. And the inſurer ſhall

(*a*) Per Lord *Mansfield*, at N. P. in *Thelluſſon* v. *Ferguſſon*, *Cowp.* 607.—(*b*) *Park*, 338.

not be answerable even for a loss by the perils of the sea.

to any omission on the part of the insured, or the refusal of government to appoint a convoy. And in such case, the insurer shall not be answerable, though the ship should be lost by the perils of the sea; for in time of war, a ship without convoy will expose herself to every other peril, to avoid that of an enemy. The fear of one danger often drives us into greater; *Cum plus in metuendo mali sit, quam in ipso illo quod timetur.*

A ship is disabled in her passage to the place of rendezvous, so as to require a repair, and the convoy sails without her.—Whether she may sail without convoy.

Emerigon puts the following case, in which he thinks the sailing with convoy may be dispensed with.—A ship is insured from *Marseilles* to *Toulon*, there to join convoy, and proceed to *America*. In her passage to *Toulon* she suffers considerable damage, and is obliged to undergo a repair there, which renders it impossible for her to avail herself of the convoy. This being a misfortune occasioned by the perils of the sea, he thinks that the ship, when repaired, may proceed without convoy, at the risk of the insurer (*a*).

There are five things essential to a sailing with convoy, viz. *first*, it must be with the regular convoy appointed by government; *secondly*, it must be from the place of rendezvous appointed by government; *thirdly*, it must be a convoy for the voyage; *fourthly*, the ship insured must have sailing instructions; *fifthly*, she must depart and continue with the convoy till the end of the voyage, unless separated by necessity. We will consider each of these subjects separately.

1. *It must be with the regular convoy appointed by government.*

A convoy what.

A convoy, within the meaning of this warranty, is a naval force under the command of an officer appointed by government for the protection of merchant ships and others, during the whole voyage, or such part of it as is known to require such protection.

(*a*) Vid. *Emerig.* tom 1, p. 164.

The

The importance of the duty which the officers and seamen, belonging to ships of war employed as convoy, have to execute, has induced the legislature to subject them to a more than ordinary responsibility; for, by the articles of war, enacted by the stat. 22 G. II. c. 33, art. 17, 'The officers and seamen of all ships appointed 'for convoy and guard of all merchant ships, or of any 'other, shall diligently attend upon that charge, without 'delay, according to their instructions in that behalf; and 'whosoever shall be faulty therein, and shall not faithfully perform their duty, and defend the ships and goods 'in their convoy, without either diverting to other parts 'or occasions, or refusing or neglecting to fight in their 'defence, if they be assailed, or running away cowardly, 'and submitting the ships in their convoy to peril and 'hazard; or shall demand or exact any money or other 'reward from any merchant or master for convoying of 'any ships or vessels intrusted to their care, or shall misuse the masters or mariners thereof, shall be condemned 'to make reparation of the damage to the merchants, 'owners, and others, as the court of admiralty shall adjudge, and also be punished criminally according to the 'quality of their offences, be it by pains of death or 'other punishment, according as shall be adjudged fit by 'the court martial.'

By the articles of war, art. 17, the officers and seamen of ships employed as convoy, are subjected to severe punishment for any misbehaviour.

A warranty to sail with convoy, or with convoy *for the voyage*, which is the same thing, is understood to mean, with such a convoy as government thinks proper to appoint; and whether it consist of one convoy for the voyage, or several convoys taken at different stations, it is still unquestionably a convoy for the voyage (*a*).

A warranty to sail with convoy, means such convoy as government shall appoint.

It is not every single ship of war, which may happen to take merchant ships under her protection, that constitutes a convoy, within the meaning of the warranty, or the understanding of merchants. Nothing short of sailing with the convoy appointed by government for the voy-

Sailing with any other force than the convoy regularly appointed, will not satisfy the warranty

(*a*) Per Lord *Mansfield*, in *Smith* v. *Readshaw*, at N. P. 1781, *Park*, 349.

age will ſatisfy the warranty. The reaſon is, that government muſt be ſuppoſed to be beſt acquainted with the plans and force of the enemy, and the ſtrength neceſſary to repel their attempts.

A ſhip arrives at the place of rendezvous, but finding the convoy had ſailed before the appointed time, ſhe puts herſelf under the protection of a man of war, and joins the convoy: This is not a ſailing with convoy.

Therefore, in a caſe which we ſhall have occaſion to mention more particularly preſently (*a*), where the ſhip inſured arrived at the place of rendezvous before the time appointed for the convoy to ſail; but finding the convoy gone, put herſelf under the protection of a man of war, which came there to join the ſquadron which compoſed the convoy, and under her protection joined the convoy, but without obtaining ſailing inſtructions: This was determined not to be departing with convoy within the meaning of the warranty.

2. *It muſt be from the place of rendezvous appointed by government.*

This is the meaning of the warranty: For though it is uſually expreſſed in general terms *to depart*, or *to ſail* with convoy, yet, as it would often be impracticable, ſometimes inconvenient, and in many caſes unneceſſary, to appoint a convoy to ſail from each particular port, there are certain places of rendezvous, appointed by government for general convenience, to each of which the merchant ſhips from the neighbouring ports may repair, by a given day, for convoy: And it is a ſufficient compliance with the warranty if a ſhip depart with convoy from ſuch place of rendezvous (*b*). This, like moſt other queſtions relating to inſurance, is regulated by the general uſage of trade.

In a voyage from *London* to the *Eaſt Indies*, it is ſufficient to ſail with convoy from the *Downs*.

Lethulliers caſe, *Sal.* 443.

Thus:—An inſurance was made, "from *London* to "the *Eaſt Indies*, warranted *to depart with convoy*." The declaration ſtated, that the ſhip proceeded to the *Downs*, and ſailed on her voyage from thence with convoy, and was loſt.—On demurrer to this declaration, it was objected that this departing with convoy from the *Downs* was not a departing with convoy within the meaning of

(*a*) *Hibbert* v. *Pigou*, inf. 272.—(*b*) The ſame rule prevails in *France*, vid. *Emerig.* tom. 1, p. 166.

the

the warranty: But the court held, that this warranty must be conſtrued according to the uſage of merchants; that is, that the ſhip ſhould ſail with convoy from ſuch place where a convoy for the voyage is to be had; as the *Downs*, &c.—Lord C. J. *Holt* differed in opinion from the other judges of the court: He ſaid,—'We take notice of the laws of merchants that are general, not of thoſe that are particular uſages. It is no part of the law of merchants to take convoy in the *Downs*.'—But the obvious anſwer to this objection is, that, to take convoy *at the uſual place of rendezvous*, is part of the general law of merchants.

The ſhip is protected by this policy in her paſſage to the place of rendezvous.

The warranty being thus underſtood, it follows that the ſhip or goods inſured are protected by the policy in their paſſage from the port of loading to the place of rendezvous appointed by government. And therefore, if the parties mean to vary from the common courſe, and to ſpecify any particular place of joining convoy, this muſt be particularized in the policy.

A ſhip is inſured from *London* to *Gibraltar*, and the convoy appointed at *Spithead*: The ſhip is protected thither by the policy.

Thus:—A ſhip was inſured "from *London* to *Gibraltar*, warranted to depart with convoy."—There was a convoy appointed at *Spithead*, and the ſhip, having tried for convoy in the *Downs*, proceeded for *Spithead*, and was captured in her paſſage thither.—In an action on the policy, the inſurers inſiſted that, this being the time of a *French* war, the ſhip ſhould not have ventured through the *Channel*, but ſhould have waited in the *Downs* for an *occaſional* convoy: And many merchants and office keepers were examined to that purpoſe.—But Lord C. J. *Lee*, who tried the cauſe, held that the ſhip was to be conſidered as under the protection of the policy *to a place of general rendezvous*, according to the interpretation of this warranty in the foregoing caſe. And if the inſurers meant to vary the inſurance from what is commonly underſtood, they ſhould have particularized her departure from the *Downs*. The jury under this direction found for the plaintiff (*a*).

Gordon v. *Morley*, at N. P. 2 *Str.* 1265.

(*a*) Vid. *Emerigon*, tom. 1, p. 166, S. P.

3. *It muſt be a convoy for the Voyage.*

A warranty to ſail with convoy generally, means a convoy for the voyage.

A warranty to ſail with convoy generally, means to ſail with convoy *for the voyage*; and it is not neceſſary to add the words, '*for the voyage*,' in order to make it ſo. Neither will the adding of theſe words in ſome inſtances, make the omiſſion of them, in any caſe, the ground of a different conſtruction. If, therefore, it be ſtipulated in a policy, that the underwriters ſhall return a part of the premium, if the ſhip ſails with convoy and arrives, this, like a general warranty to ſail with convoy, means a convoy for the voyage; and ſailing with a convoy for only a part of the voyage, will not intitle the inſured to the ſtipulated return of premium.

Where part of the premium is to be returned in caſe the ſhip ſails with convoy and arrives, this means a convoy for the voyage.

Thus:—The *Parker Galley*, was inſured, "At and "from *Venice* to the *Currant Iſlands*, and at and from "thence to *London*;" at a premium of five guineas *per cent.* "to return two *per cent. if the ſhip ſailed with convoy* "*from Gibraltar*, and arrived."—The ſhip touched at *Gibraltar* on her way home, and ſailed from thence under convoy of a ſloop of war; which, however, was only deſtined to go to a certain latitude, as far as *Cape Finiſterre*, being ordered on the *Liſbon* ſtation; and accordingly, the ſhip and convoy ſeparated, and the ſhip arrived ſafe at *London*.—The inſured brought an action for money had and received againſt one of the underwriters, for a return of the two *per cent.* and the only queſtion was, whether, by the terms of the policy, the condition for the return of this two *per cent.* was, a departure from *Gibraltar*, with ſuch convoy as could be met with, for whatever *part of the voyage* that might happen to be; or, a departure with convoy *for the voyage*.—At the trial, the plaintiff called witneſſes to prove, that, for ſome years paſt, when a convoy *for the voyage*, or the *whole voyage*, was intended, thoſe explanatory words had been added; and that, by this uſage, the expreſſions, "ſailing with convoy," and, "ſailing with convoy *for the voyage*," had acquired diſtinct technical meanings; "with convoy," merely, ſignifying whatever convoy the ſhip ſhould depart with, whether for a greater or leſs part of the

Part of the premium is agreed to be returned if the ſhip ſail with convoy from *Gibraltar*, and arrive.—This means a ſailing with convoy *for the voyage*; and a ſailing with convoy for part of the voyage will not entitle the inſured to the return of premium.

Lilly v. *Ewer*, *Doug.* 72.

the voyage. Several policies were alſo produced filled up by the ſame broker who had prepared the preſent, in which the words "for the voyage," or, "for *England*," were added. It was alſo proved, that at the time when the ſhip left *Gibraltar*, no other convoy was to be had. Witneſſes for the defendant ſwore, that they underſtood the words, "*with convoy*," to mean, convoy *for the voyage*: And the broker ſaid, that, at the time this policy was ſigned, he underſtood, and apprehended it was ſo underſtood by all the parties, that the convoy was to be for the voyage; and that the return was ſuch as was uſual when that was meant.—There was a verdict for the plaintiff.—But the court of King's Bench, upon motion, ſet this verdict aſide, and granted a new trial, being of opinion, that the words, "to depart with convoy," mean with convoy *for the voyage*.—Lord *Mansfield*, who had tried the cauſe, ſaid,—"At the trial I was ſtrongly of opinion, that, on the words, the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy that might be deſigned to ſeparate from the ſhip in a minute or two. But I ſtill think that the evidence of an uſage, not inconſiſtent with the words of the policy, was properly received at the trial. However, the people in the city think the evidence of the plaintiff's witneſſes was founded on a miſtake. Certainly, critical niceties ought not to be encouraged in commercial concerns, and wherever you render additional words neceſſary, and multiply them, you multiply doubts and criticiſms. It may be hard, becauſe words have been added in ſome inſtances, to force a conſtruction in a particular caſe, by the omiſſion of them."—Upon the ſecond trial there was a verdict for the defendant.

Evidence of an uſage of trade not inconſiſtent with the terms of the policy, is admiſſible.

Yet, a warranty to ſail with convoy does not, in all caſes, mean a convoy which is to accompany the ſhip inſured the entire way from her port of departure to her port of deſtination. The following caſe will ſhew that a convoy means ſuch convoy as government thinks fit to appoint as a ſufficient protection for ſhips going the voyage

Yet, this warranty does not always mean a convoy from the port of departure to the port of deſtination: It means ſuch convoy as government ſhall appoint for the voyage inſured.

voyage insured; whether it be for the whole or only a part of the voyage.

Goods are insured from *London* to *St. Sebastian*, and a convoy is appointed from *Spithead* to *Bilboa*:—This being the convoy appointed by government for this voyage, a sailing with it, is a compliance with the warranty.

An insurance was made on goods, "At and from *London* to *St. Sebastian* in *Spain*, *warranted to depart with convoy for the voyage.*"—No convoy was appointed directly to *St. Sebastian*, but the ship sailed from *Spithead* under a convoy of frigates, the commander of which had orders from the admiralty, to proceed to *Gibraltar*, with the trade bound "to that place and *Bilboa*, and to "detach the *Weazel* sloop of war with the latter, with "orders to see them safe to *Bilboa*, and then return to "*England* with such vessels as he should find at *Bilboa*." At the proper time, the *Weazel* was detached by the *Commodore*, with the trade to *Bilboa* and *St. Sebastian*, with orders, "to see them safe *off Bilboa*; and to take "any vessels bound from thence to *England*, under his "convoy to *Spithead*." The *Weazel* proceeded on this voyage, but soon after parted from the ships under his convoy, in chase of a strange ship, and did not afterwards join them. The ship arrived safe off *Bilboa*, which was in her course to *St. Sebastian*, but was taken in her way thither.—In an action on the policy, the underwriters objected that, the convoy being only to *Bilboa*, the warranty had not been complied with. That a convoy to *Bilboa* could no more be construed to be a convoy to *St. Sebastian*, than a convoy to the *Cape of Good Hope* would be a convoy to the *East Indies*.—But the court held clearly that this was a compliance with the warranty.—Mr. Justice *Buller* said, that this was not like the case of *Hibbert* v. *Pigon* (*a*); for there a convoy was appointed and actually sailed from *Jamaica* to *England*: That the owner of a ship, when he makes an insurance, cannot know the orders of the admiralty respecting convoys; but must take such convoy as is provided for him: That, as to the instance of a convoy to the *Cape of Good Hope*, if government thought that a sufficient protection to the *East India* trade, and the usage were for *East India*

D'Eguino v. *Berwick*, 2 *H. Bl.* 551.

Were government to think a convoy to the *Cape of Good Hope* sufficient for ships going to the *East Indies*,

(*a*) Inf. 272.

ships

ſhips to ſail with convoy only to the *Cape*, and to conſider that as the *Eaſt India* convoy, and no other convoy were appointed to the *Eaſt Indies*, the warranty would be complied with; though if there were another convoy to the *Eaſt Indies*, it would be otherwiſe.

and this were according to the uſage; ſailing with ſuch convoy would be a ſufficient compliance.

So, if a ſhip ſail with a convoy for a part of the voyage, with intent to take another convoy for the reſidue, being according to the uſage of the particular trade; this is a compliance with the warranty.

If there be ſeparate convoys for different parts of the voyage, it will be a convoy within the warranty.

Thus:—An inſurance was made on a ſhip from *Tortola* to *London*, "warranted to ſail *with convoy for the voyage.*"—In an action on this policy it appeared, that a frigate was ſent by the commander at *Saint Kitts* to *Tortola*, to bring up the ſhips from thence, with orders, if they got a certain way to the northward, to go ſtraight for *England*. They ſailed from *Tortola*, but the ſhip inſured being a bad ſailer, fell behind, loſt the convoy, and bore away for *England*, but was captured on her paſſage.—There was evidence that ſhe could not have made either *Saint Kitts* or *Tortola* again, and that ſhe did for the beſt in bearing away for *England*. On the other ſide it was in evidence that ſhe might have kept up with the convoy, as the frigate never ſailed above three knots an hour.—There was a verdict for the plaintiff.—Upon a motion for a new trial, the court held this to be a ſufficient ſailing with convoy within the meaning of the warranty.—Lord *Mansfield* ſaid,—"The frigate was the convoy from *Tortola*. The warranty never ſpecifies the *force* of the convoy, that being left to government. The policy is, that the ſhip ſhall ſail from *Tortola* with convoy *for the voyage*. But the uſage governs this agreement. The commander ſends part of his force to bring them to meet him, and that is a convoy from *Tortola*. The ſailing orders are from the commander of the convoy for *England*.

A ſhip ſails with a frigate from the place of departure to the general rendezvous with directions, in a certain caſe, to proceed ſtraight on the voyage inſured: The ſhip loſes the convoy, and inſtead of proceeding to the place of rendezvous, bears away for her place of deſtination:—This is a ſailing with convoy.

Manning v. *Gift*, B. R. E. 22 *G.* III.—M. S.

So, where the ſhip *Ceres* was inſured, "At and from *Oporto* to *Lynn*, with liberty to touch and ſtay at any ports or places on the coaſt of *Portugal*, to join convoy, particularly at *Liſbon*; at 12 guineas *per cent.*, to return 61. if the *Ceres* ſailed with convoy from the *coaſt of Portugal* and arrived."—In an action to recover this 61. *per cent.*

A ſhip is inſured at twelve guineas *per cent.* to return 61. if ſhe ſail with convoy *from the coaſt* of *Portugal*, and arrive. She ſails under convoy from *Oporto* for *Liſbon*, the

general rendezvous, in order to ſail from thence with the whole fleet. The ſhips, in their paſſage from *Oporto* to *Liſbon*, being diſperſed, the ſhip inſured runs for *England* and arrives. This is a ſailing with convoy, ſo as to entitle the inſured to the return of premium.

Audley v. *Duff*, 2 *Pul. & Baſ.* 111.

cent. of the premium, it appeared that, at the time the *Ceres* was to ſail, there were many merchant ſhips collected in the different ports of *Portugal*, and Lord *St. Vincent*, the commander on that ſtation, being unable to afford ſeparate convoys for *England* from each port in *Portugal*, ſent a cutter and a ſloop to fetch the trade from *Oporto* to *Liſbon*, where they were to lie in the bay of *Doyras*, without entering the port of *Liſbon*, to avoid the *Liſbon* duties. From that place a convoy was appointed for the whole trade to *England*. The *Oporto* fleet, in proceeding to *Liſbon*, being diſperſed, loſt the convoy, and the *Ceres*, then judging it for the beſt, ran for *England*, and arrived.—It was contended on the part of the defendant, that the *Ceres* never left the *coaſt of Portugal* with convoy. Lord *Eldon*, who tried the cauſe, told the jury that, as the *Oporto* trade had put themſelves under the convoy of the cutter and ſloop which formed a part of the aggregate convoy for *England*, they had deprived themſelves of all power of acting for themſelves, and had therefore departed with convoy from the *coaſt of Portugal*. He added, that the liberty given by the policy to touch at other ports on the coaſt of *Portugal*, did not vary the inference of her being under convoy for *England* from the moment ſhe received ſailing inſtructions; and from that time that liberty was at an end. The jury, upon this direction, found a verdict for the plaintiff.—Upon a motion to ſet this verdict aſide, and enter a nonſuit; the court were clearly of opinion that the event had happened on which the plaintiff's title to a return of premium was to attach, and therefore that the verdict was right.—Lord *Eldon* ſaid—"It being unknown in *England* from what port on the coaſt of *Portugal* the convoy would ſail, the clauſe for a return of premium was to be adapted to the circumſtances of the caſe. The departure with convoy might be from *Oporto*, or it might be from ſome other place. It became neceſſary, therefore, to introduce ſome expreſſion, which extended to ſomething more than a mere departure from *Oporto*. The fair interpretation of the agreement is, that the inſured ſhall have the benefit of the policy, though

though the ſhip ſhould ſail from *Oporto* without convoy; but that if ſhe ſailed from *Oporto*, which is on the coaſt of *Portugal*, with convoy, then there ſhould be a return of premium."

A ſhip inſured from *Cadiz* to *Amſterdam* takes a convoy to *England*, with intent to take another convoy to *Amſterdam*. This being according to uſage, is a compliance with the warranty.

So, where a ſhip, inſured "At and from *Cadiz* to "*Amſterdam*, warranted to depart with convoy for the "voyage," ſailed from *Cadiz* under a *Britiſh convoy*, and was loſt before ſhe reached the *Downs*, where it was alledged the ſhips were to have taken a freſh convoy for *Amſterdam*.—In an action on this policy, the underwriters inſiſted that the convoy ſhould have been direct to *Amſterdam*. The inſured, on the other hand, contended, that all convoy muſt be according to uſage, and that, in many voyages, there is no ſuch thing as a direct convoy; but the ſhips proceed by *relays* of convoy, from ſtage to ſtage. Lord *Kenyon*, who tried the cauſe, was of opinion, that the warranty had been complied with; and the plaintiff had a verdict.

De Garray v. Clagget, at N. P. 1795. *Park*, 349.

4. *The Ship inſured muſt have ſailing Inſtructions.*

Sailing inſtructions, what.

SAILING inſtructions are written or printed directions, delivered by the commanding officer of the convoy to the ſeveral maſters of the ſhips under his care, by which they are enabled to underſtand and anſwer his ſignals, to know the place of rendezvous appointed for the fleet in caſe of diſperſion by ſtorm, or by an enemy, &c. Such, therefore, is the utility and the neceſſity of theſe ſailing inſtructions, that no veſſel can have the full protection and benefit of convoy without them. Sailing inſtructions are, therefore, ſo eſſential to a ſailing with convoy, that, in general, unleſs they be obtained, the warranty is not complied with. It is one thing to be under the *convoy* of a ſhip of war, and another thing to ſail merely under her *auſpices* (*a*). This will appear by the following deciſion.

Eſſential to a ſailing with convoy.

An

(*a*) "Autre choſe eſt d'etre ſous l'eſcorte d'un batiment du Roi, et autre choſe eſt de naviguer ſimplement ſous ſes auſpices." *Emerig.*

Yet, ſailing inſtructions are not ſo indiſpenſably neceſſary, but that there may be caſes in which the want of them may be excuſed.

Yet it would ſeem that ſailing inſtructions are not ſo indiſpenſably neceſſary that in every caſe they muſt at all events be obtained. Mr. Juſtice *Buller*, in the caſe of *Webb* v. *Thomſon*, ſeems to have drawn the line with great preciſion.—The cauſe had been tried before Lord C. J. *Eyre*; and, upon a motion for a new trial, in his lordſhip's abſence, Mr. Juſtice *Buller* ſaid;—"Had not my lord C. J. *Eyre* declared that the verdict in this caſe was entirely to his ſatisfaction, I ſhould not decide upon this application in the firſt inſtance. The caſe is here brought to a queſtion of law. *In point of law then, the general poſition is, that ſailing inſtructions are neceſſary.* I have never decided this point myſelf; but it has often been decided. I do not ſay that there may not be caſes in which they may be diſpenſed with. In *Hibbert* v. *Pigou*, my expreſſion is,—"It is not neceſſary to ſay whether "ſailing orders are eſſential or not. As at preſent ad-"viſed, I do not ſay that they are abſolutely neceſſary." The caſe of *Victorin* v. *Cleeve* goes no further. If the ſhip inſured be at the place of rendezvous within the time appointed for the ſailing of the convoy; but, from any misfortune, from ſtreſs of weather or other circumſtances, the maſter has been abſolutely prevented from obtaining his ſailing inſtructions, and he depart with the convoy; this ſhall be deemed a ſailing with convoy. But then he muſt take the earlieſt opportunity to obtain his ſailing inſtructions. Generally ſpeaking, unleſs ſailing inſtructions are obtained, the warranty is not complied with. The captain cannot anſwer ſignals; he does not know the place of rendezvous in a ſtorm; he does not, in effect, put himſelf under the protection of the convoy, and therefore the underwriters are not benefited,"—Mr. Juſtice *Heath* and Mr. Juſtice *Rooke* concurred in this opinion.

Webb v. *Thomſon*, 1 *Pul.* & *Boſ.* 5.

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the law of inſurance. It might be an apology for the captain's ſailing as he did; and perhaps Admiral *Graves* might have been liable to anſwer for the loſs occaſioned by his leaving the place of rendezvous before the time appointed: But the warranty was not complied with; and nothing will excuſe that non-compliance.

In

In the following caſe, ſtreſs of weather was held to be a ſufficient excuſe for not obtaining ſailing inſtructions.

Streſs of weather will excuſe the want of them.

An inſurance was made 'from *Gottenburgh* to *London*, 'with a warranty to depart with convoy from *Fleckery*.'— In *July* 1744, the ſhip ſailed from *Gottenburgh* to *Fleckery*, where ſhe waited two months for convoy. On the 21ſt of *September*, at nine in the morning, three men of war, with a large convoy, ſtood off *Fleckery*, and ordered the ſhips there to come out. The ſhip inſured got out by twelve o'clock, and was one of the firſt. The convoy, having ſailed gently on, was two leagues a-head. It was a hard gale, and by ſix in the afternoon, the ſhip came up with the fleet; but could not get to either of the men of war, for ſailing orders, *on account of the gale of wind.* It was ſtormy all night, and at day-break the ſhip was in the midſt of the fleet; but the weather was ſo bad, that no boat could be ſent for ſailing orders. A *French* privateer had ſailed among them all night; and it being foggy the next day, attacked the ſhip, which kept a running fight till dark, which was renewed next morning, when ſhe was taken. In an action on the policy, it was inſiſted, that this ſhip was never under convoy; no ſhip being ever conſidered ſo, till ſhe has received ſailing orders; and if the weather would not permit the captain to get them, he ſhould have gone back. But Lord Chief Juſtice *Lee*, who tried the cauſe, and the jury, were of opinion, that as the captain had done every thing in his power to obtain ſailing orders, it was a departing with convoy.—Theſe agreements, ſaid the Chief Juſtice, are never confined to preciſe words: As in the caſe of departing with convoy from *London*, when the place of rendezvous is at *Spithead*, a loſs in going thither is within the policy. So the plaintiff recovered.

A ſhip joins convoy, but, by ſtreſs of weather, is unable to get ſailing orders; yet it is a departing with convoy.

Vi Florin v. *Cleeve*, at N. P. 2 *Str.* 1250.

So, where the ſhip inſured had departed from *London*, and, on her arrival in the *Downs*, found the convoy under ſail. The captain ſent one of his men on board for ſailing orders, which were refuſed; but the commodore ſaid, "*Keep on and I will take care of you.*" The ſhip was ſtranded and loſt that night; and the queſtion was, whether ſhe was ever under convoy, not having ſailing

If the convoy be under ſail, and the captain apply for ſailing inſtructions, which are refuſed; but he is ordered to keep on, and he will be taken care of;

this is a ſailing with convoy.

Veedon v. *Wilmot*, at G H. July 1744, *Park*, 341.

orders. Lord C. J. *Lee*, who tried the cauſe, held that ſhe was under convoy, and the plaintiff had a verdict.

This caſe can only be ſupported upon the preſumption that it was proved at the trial, that the ſhip was in the *Downs* before the time appointed for the convoy to ſail; and that the captain had done all in his power to obtain ſailing inſtructions. Had the plaintiff failed in either of theſe points, he would have been without excuſe for the want of them. He is bound to be at the place of rendezvous before the time fixed for the ſailing of the convoy; and indeed he ought to be there in time to procure his ſailing inſtructions, when they are delivered out to the other ſhips.

If the captain loſe an opportunity of obtaining ſailing inſtructions before he ſails, he will not comply with the warranty.

The captain is bound to uſe all due diligence to obtain ſailing inſtructions before the departure of the convoy; and if he loſe any opportunity, when it is poſſible for him to obtain them, and depart without them; this will not be a ſailing with convoy, though he keep under the protection of the convoy, and get his ſailing inſtructions as ſoon after ſailing as he can. This will appear in the following caſe.

A ſhip warranted to depart with convoy, comes to the place of rendezvous after the convoy is under weigh. The captain does not come on board his ſhip till ſome hours after. Had he come on board on her arrival, he might have got ſailing inſtructions before her departure. He ſails with the convoy, but is unable to get his ſailing inſtructions till next day.—This is not a ſailing with convoy within the meaning of the warranty.

Anderſon v. *Pitcher*, 2 *Pul.* & *Beſ.* 164.

An inſurance was made on the ſhip *Golden Grove*, "At and from *London*, to all or any of the *Weſt India* iſlands, *Jamaica* and *St. Domingo* excepted; with leave to go to the place of rendezvous to join convoy, and warranted to ſail from thence with convoy for the voyage."—The ſhip having been loſt ſoon after ſhe ſailed from *Portſmouth*, the plaintiff being an underwriter upon the policy, paid 284 l. 5 s. to the defendant, the inſured, on account of the loſs. But afterwards, having reaſon to think that the ſhip never received her ſailing inſtructions, and therefore could not have departed with convoy, he brought the preſent action, for money had and received, to recover back the ſum he had thus paid, under a miſtake and in his own wrong.—Upon the trial of the cauſe, it appeared that the ſhip arrived at *Spithead* about nine o'clock in the morning of the 15th of *November* 1795, under the care of the chief mate, the captain being himſelf on ſhore at *Portſmouth*. On the preceding day (the 14th), ſailing inſtructions were delivered at *Portſmouth* to all ſuch ſhips as applied regularly for them, and the captain of the

Golden

Golden Grove, previous to her arrival, made enquiry concerning ſailing inſtructions, but found they could not be obtained till the ſhip was actually in ſight. On the 15th of *November*, by day-light, the admiral commanding the convoy, got under weigh, but had not entirely quitted the roadſtead until about four o'clock in the afternoon. When he got under ſail, he left the *Trident* frigate to bring up ſuch veſſels as did not weigh anchor with him: About one o'clock on the ſame day the captain came on board the *Golden Grove*, and got under weigh, at which time the *Trident* had alſo got under weigh; and both the admiral's ſhip and the *Trident* had then proceeded ſo far, that it was clear the *Golden Grove* could not overtake the former ſoon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter. The next day, between ten and twelve o'clock in the forenoon, the captain of the *Golden Grove*, being then only a quarter of a mile from the admiral's ſhip, went on board her and obtained ſailing inſtructions. Soon afterwards the *Golden Grove* was loſt, having been, from the time of her departure to that of the loſs, under the protection of the convoy.—Lord *Eldon*, who tried the cauſe, told the jury, that although, under ſome circumſtances, ſailing inſtructions might be diſpenſed with, yet that this did not appear to be a caſe of that kind; that the *Golden Grove* did not appear to him to have departed from the place of rendezvous with convoy, ſince ſhe had either not arrived time enough to obtain ſailing inſtructions; or, if ſhe had arrived time enough, her captain had not uſed the neceſſary endeavours to obtain them before he ſailed.—The jury, under this direction, found a verdict for the plaintiff.—Upon a motion for a new trial, the court, after full conſideration, were unanimouſly of opinion, that there was no principle of law which could be the foundation of a verdict for the defendant, and therefore the plaintiff was entitled to recover.—Lord *Eldon*, in delivering the opinion of the court ſaid,—"It appears to me that if the captain of the *Golden Grove* had been on board his ſhip at nine in the morning when ſhe arrived, he might have obtained ſailing inſtructions from the frigate before he left the place of rendezvous.

This warranty must be expounded with reference to the *usage of trade.*

In point of fact, however, the admiral was under weigh before the *Golden Grove* arrived, and the frigate was under weigh before the captain was on board. It is now too late to say that this warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that in policies of insurance, the parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great judge Lord C. J. *Holt* (*a*). It is true, indeed, that Lord *Mansfield* expressed himself thus: "Wherever you render additional words necessary, and "multiply them, you also multiply doubts and criti-"cisms." Whether, however, it be not true that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned. If, therefore, the question before us be still undetermined, the inclination of my mind will be to adhere to the letter of the contract; and I feel the more disposed to do so, since it appears most clearly, that no man of the highest experience can ascertain, by any reference to usage, what other interpretation ought to be adopted. It is clear, that sailing instructions are not necessary in all cases: But in general they are essential to departing with convoy; and I do not find any thing in the circumstances of this case which can bring it within any of the exceptions. It is clear that a ship is not bound to obtain sailing instructions at the place of rendezvous *at all events*: The commander of the convoy may refuse them till the fleet is out at sea. But if they can be obtained by due diligence, she is bound to obtain them."

5. The Ship must depart, and continue with the Convoy till the end of the Voyage, unless separated by necessity.

If the ship neglect to get under weigh in time, and lose protection, though for the

If the ship insured, by negligence or delay in getting under weigh at the same time with the convoy, lose

(*a*) Vid. sup. 264, *Lethulier's* case.

the

the benefit of protection, though for ever ſo ſhort a time; this is not a departing with convoy, and the policy becomes void.

ſhorteſt time; it is a breach of the warranty.

As where the commander of a convoy from *Spithead* made ſignals for ſailing to *St. Helens* overnight, and the next morning, from ſeven o'clock till twelve, made repeated ſignals to get under weigh; yet one of the convoy did not ſail till two hours after him; in conſequence of which ſhe was captured by a privateer.—This being clearly a breach of the warranty, Lord *Mansfield*, in an action brought on the policy to recover this loſs, nonſuited the plaintiff.

Taylor v. *Woodneſt*, at N. P. Hil. Vac. 4 *G.* III. *Park*, 349.

But by this warranty, the inſured undertakes not only to depart, or to ſail, with convoy, but alſo to do all in her power to continue with ſuch convoy during the voyage, or ſo much of it as is uſual and neceſſary, and not to ſeparate from it unleſs compelled by neceſſity. This is all that the warranty requires, and all that the inſured can abſolutely undertake to do. No man would enter into a warranty to ſail with convoy at all events, during the whole of the voyage, ſo as that both ſhip and convoy ſhall arrive together; becauſe that is often, through ſtreſs of weather, and other cauſes, rendered impoſſible. Therefore, though convoy for the voyage be clearly intended by the uſual warranty, yet, an unavoidable ſeparation is an accident to which the ſhip is liable, and the inſurer ſtill continues reſponſible for any loſs that may happen during ſuch ſeparation.

The ſhip muſt not only depart with convoy, but alſo continue with it, if poſſible, during the voyage.

Thus: A ſhip was inſured, "from *London* to *Naples*, warranted to depart with convoy."—The ſhip did depart from the port of *London*, in company with the convoy, but two days after was ſeparated by a ſtorm. The convoy put into *Torbay*, and the ſhip inſured into *Fowey* in *Cornwall*. Three days afterwards, the wind ſetting right to bring the convoy down the *Channel*, the ſhip ſailed from *Fowey* to meet the convoy; but it did not come, and the ſhip meeting with another ſtorm, was driven on the *French coaſt*, and there taken.—Upon this

A ſhip ſails with the convoy, and is ſeparated by ſtreſs of weather, but does all in her power to rejoin the convoy;—this will not diſcharge the inſurers.

Jeffery v. *Legendra*. 3 *Lev.* 320, S. C. *Carth.* 216, 2 *Salk.* 443, 1 *Show.* 320, 4 *Mod.* 58,

case it was decided, upon great consideration, that the insured was intitled to recover, there being no neglect or default in the master of the ship: Having departed with convoy, and done all in his power to keep company with it, this answers the words of the policy.—That the meaning of the warranty, *to depart with convoy*, is, that the ship shall keep company with the convoy during the whole voyage, if possible; and, therefore, if the master of the ship insured had been guilty of any fraud or neglect after his departure, notwithstanding he *departed* with convoy, this would have been a breach of the warranty, and the policy would have been discharged.

But if the master, through fraud or negligence, leave his convoy, it is a breach of the warranty.

If a ship be separated from the convoy by stress of weather or any other cause, she ought to use every endeavour to join it again as soon as she is able; but if she neglect to do so, the insurers will be discharged.

If a ship, separated from the convoy, neglect to rejoin it, the insurers are discharged.

Before I conclude this branch of the subject, it will be proper here to mention the regulations which have been made by a late act of parliament on the subject of convoy.

The avidity of gain having often tempted our merchants to risk their ships and goods at sea, in time of war, without the protection of convoy, and which they were enabled to do at the expence of an additional premium to cover the additional risk, the wisdom of government perceived the impolicy of suffering the continuance of a practice as injurious to our commerce as it was beneficial to the enemy, and therefore an act of parliament has been passed for the double purpose of compelling ships to sail with convoy, and, by a moderate tax on foreign commerce, to raise a revenue sufficient to defray the extraordinary expences of providing a naval force equal to the protection of all our commerce.

By stat. 38 G. III. c. 76, § 1. No ship belonging to his Majesty's subjects (except as hereafter) shall sail from any port without convoy.

By stat. 38 *G.* III. c. 76, § 1, it is enacted, 'That 'no ship or vessel belonging to his Majesty's subjects, 'except as therein-after is excepted), shall sail or depart 'from any port or place whatsoever, unless under the

'convoy

'convoy and protection of such ship or ships as may be 'appointed for that purpose.

§ 2. The master of every ship sailing under convoy, shall use his utmost endeavour to continue with such convoy during the voyage, and shall not quit it without leave.

'That the master or other person having the charge or 'command of every ship or vessel, which shall sail or 'depart under the protection of convoy, shall and is 'thereby required to use his utmost endeavours to con-'tinue with such convoy during the whole of the voy-'age, or during such part thereof as such convoy shall be 'directed to accompany and protect such ship, and shall 'not wilfully separate or depart therefrom upon any pre-'tence whatever, without order or leave for that pur-'pose from the officer having the command of such 'convoy.'

§ 3. Any master of a ship sailing without convoy, or quitting it without leave, shall forfeit 1000 l.; and in case the cargo consist of naval or military stores, 1500l.

'That if the master or commander of any ship, 'which is by this act required not to sail without convoy, 'shall sail without convoy; or having sailed with convoy, 'shall wilfully depart therefrom without leave first ob-'tained from the person entrusted with the charge of such 'convoy, every such master shall forfeit 1000 l. and in 'case the whole or any part of the cargo consisted of na-'val or military stores, the penalty is 1500 l. with a 'power in the court, where the action may happen to 'be brought, to mitigate the penalties, so as they are not 'reduced to a less sum than 50 l. (*a*).

§ 4. In case of a sailing without, or deserting, convoy, the insurance on the ship shall be void; and the

'That in case of a sailing without, or a wilful deser-'tion of, convoy, every insurance, or contract or agree-'ment for any insurance, upon such ship, or goods, 'wares or merchandize laden thereon, or upon any pro-

(*a*) In *France* the punishment for quitting convoy was much more severe. By an ordinance of 1689, the master of a merchant ship, separating from his convoy, was condemned to the gallies. This punishment, by an ordinance of 1745, was moderated to a fine of 1000 livres, a year's imprisonment, and and being declared incapable of ever commanding any vessel at sea. By an ordinance of 1765, the commander of the convoy is directed to give an account to the secretary of state for the marine department, of such masters of merchant ships as navigate badly, or delay the convoy. Vid. *Emerig.* tom. 1, p. 167, 443.

premium ſhall not be recoverable back from the inſurers.

'perty, freight, or other intereſt ariſing out of the ſame, 'whereon inſurances may lawfully be made, (and which 'ſhall be the property of the maſter or commander of the 'ſhip, ſo ſailing without convoy, or wilfully quitting 'the ſame, or of any perſon intereſted in ſuch veſſel or 'cargo, who ſhall have directed or been any way privy 'to, or inſtrumental in cauſing ſuch ſhip or veſſel to ſail 'without convoy, or wilfully to ſeparate therefrom), ſhall 'be null and void to all intents and purpoſes both at 'law and in equity, any contract or agreement to the con-'trary notwithſtanding; and that nothing ſhall be reco-'vered thereon by the inſured for loſs or damage, or 'for the premium, or conſideration in nature of a pre-'mium, which ſhall have been given for ſuch inſurance: 'And if any party to ſuch inſurance, or any broker or 'other perſon ſhall tranſact a ſettlement, or allow any 'money in account, on ſuch inſurance, every ſuch per-'ſon ſhall forfeit 200 l.'

§ 5. Before any ſhip ſhall clear outwards, bond ſhall be given that ſhe ſhall not ſail without, or deſert, convoy.

'That the officers of the cuſtoms ſhall not permit veſ-'ſels to clear outwards, till bond has been given with one 'ſurety, in the penalty of the value of the ſhip, with 'condition that the ſhip ſhall not ſail without, nor wil-'fully deſert, the convoy.

§ 6. This act is not to extend to veſſels not required to be regiſtered, nor having licences to ſail without convoy, or going to join convoy, or bound to *Ireland*, or from one port to another in *Great Britain*, or to the ſhips of the *India* or *Hudſon's Bay* companies.

'But this act is not to extend to veſſels, not required 'to be regiſtered by any acts then in force; nor to any ſhip 'having a licence ſigned by the Lords of the Admiralty 'to ſail without convoy, or by ſuch perſons as ſhall be 'duly authorized by them for that purpoſe; or to any ſhip 'proceeding with due diligence to join convoy from the 'port or place of departure, except as to the bond hereby 'required to be taken upon the clearance outwards; or to 'any ſhip bound to or from any port in *Ireland*; or to ſhips 'bound from one port to another in *Great Britain*; nor 'to ſhips in the ſervice of the *Eaſt India* or *Hudſon's Bay* 'companies.'

§ 8. Nor to ſhips ſailing from foreign ports, where no convoy is appointed.

'That this act is not to extend to ſhips ſailing from 'foreign ports, in caſe no convoy is appointed by the 'Lords of the Admiralty of *England*, or perſons autho-'rized by them at ſuch foreign ports to appoint convoys, 'or to grant licences for ſailing without convoy.'

§ 9. Maſters of ſhips ſhall have flags, &c. to anſwer ſignals.

'That the Lords of the Admiralty are to give notice 'in the *Gazette* that maſters of ſhips ſhall have on board, 'flags and vanes for the purpoſe of diſtinction, and of 'anſwering ſignals; and without having which they are 'not to be cleared outwards.'

§ 10. The clauſe of the 33 *G.* III. c. 66, for puniſhing maſters for deſerting convoy or diſobeying ſignals, ſhall be put up in every ſhip on pain of 50l.

'That ſo much of the ſtat. 33 *G.* III. ch. 66, ſect. 8, 'as makes the maſters of ſhips under convoy liable to be 'articled in the Court of Admiralty, for diſobeying ſig-'nals or other lawful commands of the commodore, or 'deſerting convoy, and finable at the diſcretion of the 'ſaid court, in any ſum not exceeding 500l. and puniſh-'able by impriſonment, not exceeding one year, ſhall be 'painted on a board, and affixed on ſome conſpicuous 'and convenient part of every ſhip which by this act is 'required not to ſail or depart without convoy; and that 'in default thereof, every maſter or other perſon, having 'the charge or command of any ſuch ſhip, ſhall forfeit, 'for every ſuch offence, the ſum of 50l.

§ 11. Ships in danger of being taken ſhall make ſignals, and if taken the maſter ſhall deſtroy his ſailing inſtructions on pain of 100l.

'That if any ſhip, required by this act not to ſail 'without convoy, ſhall be in imminent danger of being 'taken by the enemy, the commander of the ſhip ſhall 'make ſignals by firing guns to convey information of 'his danger to the reſt of the convoy, as well as to the 'ſhips of war under the protection of which he is ſail-'ing; and that, in caſe he is taken poſſeſſion of, he ſhall 'deſtroy all inſtructions confided to him relating to the 'convoy; and every commander wilfully neglecting to 'make ſuch ſignals, or to deſtroy ſuch inſtructions, ſhall, 'for every ſuch offence, forfeit a ſum not exceeding '100l.'

Theſe are the principal clauſes relating to ſailing with convoy, the reſt of the act is employed in fixing the duties, and directing how they ſhall be collected.

A foreign built ſhip, though *Britiſh* owned, is not required to be regiſtered, therefore ſhe may ſail without convoy, without a licenſe to do ſo.

The ſixth ſection of this act provides that it ſhall not extend to veſſels *not required to be regiſtered*. A foreign built ſhip, though *Britiſh* owned, is not required to be regiſtered, by any of the regiſter acts, and there an inſurance on ſuch ſhip is good, though ſhe ſail without convoy, and without a licenſe to do ſo. This was determined in the following caſe.

The

A foreign built ship, *British* owned, sails without convoy, and without a licenſe ſo to do.—The ſhip being within the exception of the 38 *G.* III. c. 76, § 6, a policy on her will be good; and it is not neceſſary to communicate to the underwriters at the time of making the policy, that the ſhip is foreign built.

Long v. *Duff*, and *Long* v. *Bolton*, 2 *Pul.* & *Baſ.* 209.

The ſhip *Lucy* was inſured in ſeveral policies, "At and from *Padſtow* in *Cornwall* to *Leghorn*."—She was *Spaniſh* built and purchaſed at *Hamburgh* by the plaintiff, a *Britiſh* ſubject,—ſhe was not regiſtered, but had paid the alien duties. Previous to her ſailing on the voyage inſured, the captain applied for a licenſe to proceed without convoy to *Leghorn* and *Naples*, but only obtained a licenſe for *Naples*, without convoy, and was captured off that place by a *French* privateer. The only difference between the two caſes was, that in the former it was repreſented to the underwriters, at the time of effecting the policy, that the *Lucy* was a foreign ſhip, and not regiſtered; in the latter, no ſuch repreſentation was made:—It was objected in both actions, that as the licenſe obtained did not extend to the voyage inſured, the *Lucy*, though foreign built, and *Britiſh* owned, was within the proviſions of the ſtat. 38 *G.* III. c. 76, the convoy act, which makes void all policies upon ſhips ſailing without convoy; and in the ſecond, that ſuppoſing her not to be within the proviſions of that act, that circumſtance ought to have been communicated to the underwriters.—Upon the trial it was left to the jury to determine whether, according to the uſage of merchants, it was the duty of the inſured to give this information, or of the underwriter to ſatisfy himſelf upon that point. The jury decided, that it was the buſineſs of the underwriter to obtain this information for himſelf.—Upon motions for new trials in theſe cauſes, the court decided, that it was properly left to the jury to determine this point, and alſo that foreign built ſhips in the hands of *Britiſh* owners, are not required to be regiſtered, and therefore, that the verdicts for the plaintiff muſt ſtand.—Lord *Elden*, in delivering the opinion of the court, ſaid, "With reſpect to the general point, the queſtion is, whether a veſſel in the ſituation of the *Lucy*, departing without convoy, not having obtained a proper licenſe ſo to do, can be deemed to be protected by the policy, or, whether that policy be not altogether void under the proviſions of the ſtat. 38 *G.* III. c. 76, § 4 (*a*). The policy

(*a*) Sup. 284.

of

of this act, as ſtated in the preamble, is, 'that it will 'add to the ſecurity of trade to prevent ſhips ſailing 'without convoy, except in certain caſes.' This will undoubtedly apply to ſhips foreign built. But whether it was intended to be carried to that extent, is the queſtion we are now to decide; and that we muſt do by examining the clauſe which is to carry the principle into effect. The *fifth* ſection of that act provides that nothing in the act contained, by which ſhips are required not to depart without convoy, ſhall extend to any ſhip or veſſel, *which is not required to be* 'regiſtered by any act or acts of par-'liament in force on or immediately before the paſſing of 'this act.' The true queſtion then, is, whether this ſhip was required to be regiſtered by any ſtatute in force when the convoy act paſſed. She was foreign built, and purchaſed previous to the time when the prohibition took place; and in order to aſcertain whether ſhe, being *Britiſh* owned, is required to be regiſtered, or not, we muſt look back to our navigation laws." His Lordſhip then took a moſt comprehenſive and accurate view of all our navigation laws relating to the regiſtry of ſhipping, down to the laſt regiſter acts, 26 *G.* III. c. 60, and 27 *G.* III. c. 19. He then ſaid,—"After the beſt conſideration which I have been able to give the *regiſter act*, and after converſing with the noble lord who framed it (*a*), as well as with the learned author of the treatiſe to which it gave riſe (*b*), the determination I have come to is, that foreign built ſhips, in *Britiſh* ownerſhip, are not required to be regiſtered, and conſequently that this verdict muſt ſtand." His Lordſhip then examined the ſeveral clauſes of the regiſter acts, 26 *G.* III. c. 60, 27 *G.* III. c. 19, and 34 *G.* III. c. 68, and ſaid,—"It is not ſaid that ſhips not re-

(*a*) Lord *Hawkeſbury*, now Earl of *Liverpool*, to whom his country is highly indebted for the many excellent and judicious regulations he has introduced upon this moſt important ſubject.

(*b*) *John Reeves* Eſq. who has very much promoted the commercial intereſts of *Great Britain* by his valuable hiſtory of the law of ſhipping and navigation.

giſtered

gistered shall not be navigated or owned by *British* subjects. A *British* owner of a foreign built ship may engage in neutral trade, and will be liable to the alien duties; but it was not the policy of the legislature to prevent *British* subjects from employing foreign ships in neutral trade, in as ample a manner as they can be employed by aliens."

Sect. 5.

That the Thing insured is Neutral Property.

IN treating of this important branch of the law of insurance, we will consider, 1st. The nature of this warranty; 2dly. When it shall be falsified by a *judgment* of condemnation as prize; and, 3dly. What shall amount to a forfeiture of neutrality.

1. *The Nature of this Warranty.*

As the premium is meant to be proportioned to the nature of the risk, and as the general words of the policy, unless restrained or qualified by some special stipulation, subject the insurer to every loss by capture, it is of great importance, in times of war between maritime states, to ascertain whether the ship or goods meant to be insured be liable to capture, as belonging to either of the belligerent powers. If the insured profess to be the subject of a neutral state and mean to be insured as such, the insurer requires him to *warrant* the ship or goods to be neutral property. This is done by inserting in the policy either the words, '*warranted neutral*,' or, '*warranted* '*neutral property*;' and sometimes the warranty is, that they belong to the subjects of some particular neuttal state.

How expressed in the policy.

What shall be deemed neutral property.

Neutral property, in the sense in which that expression must be understood in this warranty, is that which belongs to the subjects of a state in amity with the belligerent powers.

If

If the warranty be falſe at the time it is made, the policy will be void *ab initio*. But the following caſe ſhews that it is ſufficiently true if the thing inſured be neutral property *at the time when the policy is effected*, the chance of future war being always a riſk within the policy.

It is ſufficient if the warranty be true when made.

A *Dutch* ſhip and cargo were inſured, "At and from "*L'Orient* to *Rotterdam*, both *warranted neutral* pro- "perty:"—The ſhip being captured by an *Engliſh* man of war, an action was brought on the policy; and the declaration ſtated that the defendant ſubſcribed the policy on the 28th of *November* 1780, and averred that the ſhip and cargo were *at that time*, neutral property.—Upon the trial it appeared that the ſhip ſailed from *L'Orient*, on the 11th of *December* 1780, and both ſhip and cargo *were then neutral property*, and ſo continued till the 20th of *December*, when, hoſtilities having commenced between the *Engliſh* and the *Dutch*, the ſhip and cargo ceaſed to be neutral property, were taken on the 25th of *December*, and condemned as lawful prize.—The court, upon this caſe, were clearly of opinion, that the plaintiff was intitled to recover.—Lord *Mansfield* ſaid,—"The inſured warranted the ſhip and cargo neutral property, and the defendant would have the court to add, by conſtruction, "*and ſo ſhall continue during the whole voyage.*" The contract was not ſo. The inſured told the ſtate of the ſhip and goods *then*; and the inſurers took upon themſelves all future events and riſks, from men of war, enemies, detentions of princes, &c. The owners themſelves could not have changed the nature of the property; but they did not mean to run the riſk of the war. If it would have made a difference, to what country the property belonged, the underwriters ſhould have enquired. The riſk of future war is undertaken by the inſurer in every policy. The warranty is, that things ſtand ſo at the time, not that they ſhall continue ſo.

A ſhip warranted neutral on the 28th of *November*, ſails on the 11th of *December*. Hoſtilities commence on the 20th *December*, and ſhe is captured on the 25th.—This does not falſify the warranty, and the inſurer is liable.

Edin v. *Parkinſon*, *Doug.* 705. S. P. ruled in *Saloucci* v. *Johnſon*, *Park* 364, and admitted in *Tyſon* v. *Gurney*, 3 T. R. 477.

The chance of future war is always a riſk within the policy.

2. *When*

2. *When this Warranty ſhall be falſified by a Judgment of Condemnation as Prize.*

The uſual evidence to falſify this warranty or prove a forfeiture of it, is a ſentence of condemnation as prize.

The evidence uſually adduced to falſify this warranty, or to prove a breach or forfeiture of neutrality, which amounts to a breach or forfeiture of the warranty, is the judgment or ſentence of a court of admiralty, or other court having juriſdiction in queſtions of prize, by which the ſhip or goods inſured, and warranted neutral property, have been condemned as prize. Copies of the ſentence and of the other proceedings in the court of admiralty, properly authenticated, are always deemed ſufficient evidence of the fact of the condemnation, and of the grounds upon which it proceeded.

The judgments of foreign courts are in general concluſive in ours.

A certain comity is ſaid to prevail amongſt civilized ſtates by which the judgments of courts of juſtice, having competent juriſdiction, in any country, are regarded as concluſive upon the ſubject upon which they have been pronounced in the courts of all other countries; and this is ſo binding upon the courts of this kingdom, as we ſhall have occaſion to obſerve hereafter, that foreign deciſions are conſidered as concluſive upon the points decided by them, even when they are manifeſtly unjuſt (*a*).

But the *French* pay no regard to the judgments of foreign tribunals.

The courts of juſtice in *France* do not carry their complaiſance ſo far. The judgments of foreign tribunals have there no weight or authority whatever againſt *Frenchmen*; and the cauſe muſt be again decided in their courts (*b*).

Yet a ſentence, to be binding *England*, muſt be the ſentence of a court of competent juriſdiction.

But in order that a foreign ſentence may be received in our courts as admiſſible evidence, and poſſeſs the authority aſcribed to it, the court in which it was pro-

(*a*) Vid. Lord *Kenyon*'s judgment in *Geyer* v. *Aguilar*, inf. 297. —(*b*) "Les jugemens rendus par les tribunaux étrangers, ne ſont en *France* d'aucun poids contre les *Francois*. Il faut que la cauſe y ſoit de nouveau décidée.—D'ou il ſuit que le jugement de confiſcation, prononcé par un tribunal ennemi, n'eſt ni une preuve que le véritable *pour compte* ait été caché, ni un titre que les aſſureurs puiſſent alléguer pour ſe diſpenſer de payer la perte. Telle eſt notre juriſprudence." *Emerig.* tom. 1. p. 458.

nounced

nounced muſt appear to have been a court lawfully conſtituted, and of competent jurisdiction in ſuch matters. And therefore, if it appear to have been held under any uſurped or illegal authority, or contrary to the law of nations, the ſentence will have no validity.

The ſentence of a conſul of a belligerent power, *reſident in a neutral ſtate*, has no authority in our courts.

This was determined by a very eminent and learned judge of our court of admiralty (*a*), on the 16th of *January* 1800, in the caſe of the ſhip *Flad Owen*, which had been captured by the *French*, carried into *Bergen* in *Norway*, condemned by the reſident conſul there, and purchaſed by a *Daniſh* ſubject. One queſtion before the court of admiralty was, whether a ſale under ſuch a ſentence of condemnation would transfer the property to the neutral vendee. Upon this point the learned judge declared that ſentences of condemnation always appeared to be the ſentences of courts acting, and exerciſing their judicial functions, *in* the belligerent country; and that this was the very firſt attempt that had ever been made to impoſe upon the court a ſentence of a tribunal not exiſting in the belligerent country, but of a perſon pretending to be authorized within the dominions of a neutral ſovereign: That, even if it could be ſhewn that, upon mere ſpeculative principles, ſuch a condemnation ought to be deemed ſufficient, that would not be enough. It ought to be ſhewn that it was agreeable to the uſage and practice of nations; 'and when I am told,' ſaid he, 'that, before the preſent war, no ſentence of 'this kind was ever produced in the annals of man-'kind, and that it is produced by one nation only in 'this war, I require nothing more to ſatisfy me that it 'is the duty of this court to reject ſuch a ſentence as 'inadmiſſible."

This deciſion of the court of admiralty, and the reaſons on which it was founded, has been ſince fully approved and adopted by the court of King's Bench in the caſe of *Havilock* v. *Rockwood* (*b*), which will be more particularly noticed hereafter. For the preſent it will be

(*a*) Sir *William Scott*.—(*b*) 8 T. R. 268. inf. c. 14. § 3.

ſufficient to ſtate that it was there determined, that a condemnation by the *French* conſul at *Bergen* in *Norway* had not the effect of diveſting the property of a captured ſhip out of the original owner.

In what caſes ſuch ſentences ſhall be deemed concluſive evidence to falſify, or prove the forfeiture of the warranty, has been often found to be a very perplexing queſtion, and has produced much litigation and many deciſions, which are not eaſily reconciled, or reducible to any well defined principle.

Where the ground of condemnation is declared to be that the thing inſured was enemy's property, it is always concluſive.

One thing, however, is clear and indiſputable, that if it be adjudged that the ſhip or goods inſured were enemy's property, and this appear on the face of the ſentence, to have been the ground of the condemnation, the ſentence is concluſive evidence to falſify the warranty.

A ſentence of condemnation on the ground that the ſhip is *not neutral* is concluſive, though it expreſs no other ground.

From the following caſe it will appear that, by our law, if a ſhip be warranted to belong to the ſubjects of a particular neutral power, and ſhe be condemned generally in a court of prize, as not being ſuch; the ſentence will be concluſive evidence to diſprove the warranty, though it expreſs no other ground of condemnation.

Fernandes v. *Da Coſta*, at N. P. after Hil. 4 *G.* III. *Beawes* 314.

In an action on a policy on goods on board a ſhip, which was warranted *Portugueze*, the plaintiff gave colourable evidence that the ſhip was *Portugueze*; but that, being obliged, by the perils of the ſea, to put into a *French* port, the cargo was ſpoiled and the loſs incurred. This was admitted by the defendant, but he alledged that, while the ſhip was in the *French* port, ſhe was libelled againſt, and condemned, as not being *Portugueze*; and to prove this, he produced the ſentence of condemnation, and the confirmation thereof in the courts of prize in *France*, together with an anſwer of the plaintiff to a bill in chancery, wherein he had admitted that the ſhip was condemned as not being *Portugueze*; and he contended, that though the goods were loſt by a different peril from that of being enemy's property, yet, that in fact the ſhip was not *Portugueze*, though warranted ſuch, and this vitiated the policy *ab initio*. This was agreed to be law.—Lord *Mansfield* ſaid, that as the ſentence was general, and did not expreſs the ground of the condemnation,

demnation, atteſted copies of the *libel* ought, in ſtrictneſs to have been produced, to ſhew upon what ground the ſhip was libelled againſt: But as the plaintiff, by his anſwer in chancery, has admitted that the ſhip was condemned as not being *Portugueze*; this, added to the expreſſion uſed in the ſentence of confirmation, viz. that the ſhip was condemned in the *court of prizes*, amounts to ſufficient evidence to proceed upon; and thereupon the defendant had a verdict.

If the ground of the ſentence do not appear on the face of it, other evidence may be reſorted to in order to ſhew the ground.

Lord *Mansfield*, in the above caſe, ſeems to have thought that where it does not appear on the face of the ſentence, that the condemnation proceeded on the ground of the thing inſured being enemy's property, other evidence ought to be reſorted to, in order to have that aſcertained. But in the following caſe, it was determined that where a ſhip is condemned generally *as good prize*, and no ſpecial ground appears on the face of the ſentence, the ſentence is concluſive evidence that the property was not neutral.

Even a ſentence of condemnation generally *as prize*, is concluſive.

Goods were inſured on board the *Thetis*, a *Tuſcan* ſhip, *warranted neutral*.—The ſhip was taken and carried into *Spain*, and there condemned as *good and lawful prize*; but the ſentence ſtated *no ground* upon which it proceeded. This ſentence was appealed from and reverſed, but upon a farther appeal, the latter ſentence was reverſed and the former confirmed.—In an action on the policy, Lord *Mansfield*, upon the trial, was of opinion that the ſentence of the *Spaniſh* court of admiralty was concluſive evidence to falſify the warranty; and nonſuited the plaintiff.—This deciſion, upon a motion to ſet aſide the nonſuit, was confirmed by the whole court.—Lord *Mansfield* ſaid,—"The warranty is, that the goods are neutral. It muſt be preſumed, from the condemnation, as no other cauſe appears, that it proceeded on the ground of their being *enemy's property*. In the caſe of *Bernardi* v. *Motteux* (a), the deciſion turned on the particular ground of the condemnation appearing on the face of the ſentence, which ſhewed that it was not that

A ſentence only condemning as lawful prize, without ſtating any ground, is concluſive againſt the warranty.

Saloucci v. *Woodmaſs*, B. R. Hil. 24 *G.* III, M. S. S. C. *Park* 361.

(a) Poſt 295.

of being the enemy's property; and for this reaſon the plaintiff was permitted to ſhew by evidence that the ſpecific ground was really the cauſe of the condemnation. The counſel admitted the general rule, but at the trial ſaid, that the ſpecial cauſe would appear upon the proceedings, if they could be had. The proceedings, are now here, and ſhew that the queſtion turned entirely upon the property of the goods; for the ſecond court decreed that *the goods were free*, but the laſt court reverſed that decree. It is ſufficient, however, that no ſpecial ground is ſtated."

But if the ſpecial ground ſtated in the ſentence, do not prove that the thing inſured was not neutral, the ſentence will not be concluſive.

Although Lord *Mansfield*, in this caſe, nonſuited the plaintiff on the bare production of the ſentence; yet, in delivering his opinion upon the argument, he lays ſo much ſtreſs on the proceedings, then produced, not ſtating a ſpecial ground of condemnation, that it may be fairly inferred, that if ſuch a ground had appeared, which did not diſtinctly falſify the warranty, the nonſuit would have been ſet aſide.

This idea is confirmed by a ſubſequent deciſion in the caſe of *Saloucci* v. *Johnſon*, which we ſhall preſently have occaſion to cite at large (*a*). That was an action on another policy on the ſame ſhip *Thetis*, for the ſame voyage, warranted a neutral ſhip; and it appearing upon the face of the ſentence that the ground of condemnation was the ſhip's refuſal to be ſearched, and reſiſting with force, the court deeming ſuch reſiſtance juſtifiable, determined that the ſentence did not falſify the warranty.

If the ſpecial ground ſet forth in the ſentence do not neceſſarily falſify the warranty, the court may enquire into its truth.

In a more recent caſe the ſame queſtion aroſe, and the court of *King's Bench* determined, that where the ſpecial grounds of condemnation ſet forth in the ſentence do not neceſſarily negative the warranty, the court may receive evidence to prove the truth of it.

Goods warranted *American* were inſured from *London* to *Virginia*; and a foreign court, after reciting that "the true

That was an inſurance on the goods and private adventure of the captain, warranted *American* property, on board the ſhip *Friends*, "At and from *London to Virginia*,"—In an action on the policy, it appeared upon the trial, that the property of the goods was in the plaintiff who was an *American*; that the ſhip was *American*

(*a*) Vid. inf. 301.

built

built, and manned by *American* ſailors; had been conſigned by the owners in *Virginia* to their correſpondents in *London*, upon the voyage inſured, having all neceſſary papers on board to ſhew that ſhe was an *American* ſhip; and, that the real place of her deſtination was *Norfolk* in *Virginia*, to which port ſhe belonged; that, in the courſe of her voyage, having met with tempeſtuous weather, and being much damaged, ſhe was obliged, from diſtreſs, to bear away to ſome port in the *Weſt Indies*, in which courſe ſhe was captured by a *French* privateer, and carried into *Guadaloupe*, where ſhe was condemned by a ſentence of the court of commerce there, expreſſed, as to the matter in judgment, in theſe terms: "Foraſ-"much as the true deſtination of the ſaid veſſel was "for the *Engliſh* iſlands, having been hired and loaded "at *London*, and that there have been found on board "her eighty barrels of gunpowder (*a*); the court declares "the ſaid brig *Friends* a good prize for the benefit of "the captors, together with her tackle, apparel, cargo, "and generally all that belongs to her, &c."—A verdict was taken for the plaintiff, with liberty to the defendant to move to ſet it aſide and enter a nonſuit.—Upon that motion, the court were clearly of opinion, that the ſentence was not concluſive evidence to falſify the warranty; and that therefore the plaintiff was entitled to recover.—Lord *Kenyon* ſaid,—"That the juſtice and honeſty of the caſe are with the plaintiff is beyond all doubt, and that the ſhip was *American*, and the goods the property of an *American*, is equally clear. But it is contended that though, in point of fact, this be true, yet the ſentence of condemnation precludes the plaintiff from aſſerting it. I yield to the caſes cited which ſhew that, to a certain degree, this court will ſupport the proceedings in foreign courts by preſuming that their ſentences are juſt; and I will not make any exception, at preſent, of the proceedings of the *French* courts of admiralty (*b*).

"deſtination of "the ſhip was "to the *Britiſh* "*Weſt Indies*, "having been "hired and "loaded at *Lon-*"*don*, and hav-"ing on board "80 barrels of "gunpowder," declares the ſhip and cargo good prize. This ſentence is not concluſive evidence againſt the warranty; and the court here may receive evidence to prove the truth of it.

Calvert v. *Bovill*, 7 T. R. 523.

(*a*) This was part of the captain's adventure, the reſt conſiſting of ſlops, porter, cheeſe, and ſhip chandlery.—(*b*) *Guadaloupe* was then under the government of the *French Executive Directory*.

But when an attempt is made to pervert the juſtice of the caſe; it becomes neceſſary for us to ſee whether the deciſion of the court at *Guadaloupe* has ſo determined on the fact of neutrality, that we cannot examine into it. It has been ſaid that, nothing can juſtify the ſentence of the *French* court of admiralty, but the fact that this was *Britiſh* property. But that is a concluſion againſt all the facts proved in the caſe. If, indeed, that court had ſtated in their ſentence, that they condemned the goods, becauſe they were *Britiſh* property, I ſhould have conſidered myſelf bound by their ſentence. But they have themſelves aſſigned other reaſons for their adjudication. The expreſs grounds of the ſentence are, that the ſhip was deſtined for one of the *Weſt India* iſlands, that ſhe was hired and loaded at *London*, and that ſhe had a certain quantity of gunpowder on board; *therefore*, they condemned her and her cargo as good prize. Then it is impoſſible for us to conclude that the *French* court decided on the ground that this was *Britiſh* property, when all the evidence in the cauſe, and the reaſons expreſsly given by them for their judgement, lead to a contrary concluſion."—Mr. Juſtice *Lawrence* ſaid, that the caſes alluded to in the argument ſeemed to have eſtabliſhed this, that if it can be collected from the ſentence itſelf, on what ground the foreign court decided, that would be concluſive in any action brought in this country: But that if it were ambiguous, or did not ſhew on the face of it, on what ground they proceeded, then the court here might receive evidence to ſhew what were the grounds of the deciſion abroad.

If the ſentence be ambiguous it will not be concluſive.

From the following caſe it will appear that if the ſentence be ambiguous, and there be reaſon to ſuppoſe that it proceeded on a different ground from that of enemy's property, it will not be concluſive evidence to falſify the warranty.

The ſentence of a *French* court of admiralty ſtated, 'that the 'captured ſhip 'was on her

An inſurance was made upon freight and goods, "At "and from *Venice to London, warranted neutral ſhip and* "*neutral property.*"—The ſhip on her voyage was taken by a *French* frigate and condemned. Upon the trial, the plaintiff

plaintiff offered to prove that both ship and cargo were neutral; and that the ship's papers fell overboard by accident, after she was brought to by the *French* frigate. But the defendant objected to this evidence, and produced an atteſted copy of the ſentence of condemnation of the *French* admiralty court, as concluſive evidence to ſhew that the ſhip and cargo were not neutral property. This ſentence, after ſtating from the *procès verbal*, made when the ſhip was taken, the capture of the ſhip, and the endeavour of the captain to avoid coming on board the frigate with the ſhips papers, ſtated, "that the cap- "tain being at laſt obliged to comply, upon threats being "made of firing on him, and being come on board, he "declared that, *in getting up the ſhip's ſide, the box contain-* "*ing his muſter-roll, his patents, and paſſport, had fallen* "*from his pocket into the ſea, and only ſhewed his bills of* "*lading*, by which it appeared that the ſhip, commanded "by a *Venetian*, ſailed from *Venice* with a cargo of ſilk, "raiſins, oil, &c. *for the account of ſundry perſons in Ve-* "*nice, conſigned to ſundry perſons in* London. That theſe "goods *going to an enemy's country, and the loſs of his* "*papers raiſing ſuſpicions*, the ſhip was ſtopped and ſent "into *Almeiria*." The ſentence then ſtates that, "*Theſe* "*premiſes being conſidered*, the ſhip and cargo are declared "good prize, and adjudged to the captors."—The queſtion, upon this caſe was, whether the above ſentence was concluſive to falſify the warranty. In the courſe of the argument, an *arrêt* for the regulation of the *French* marine, dated the 26th of *July* 1778, and the *procès verbal* made at the time of the capture, though not proved at the trial, or ſtated in the caſe, were much referred to. By this *arrêt*, art. 3. "All veſſels with their cargoes, "whether neutral or allied, from which *any papers* have "been thrown into the ſea, ſuppreſſed or abſtracted, "ſhall be declared good prize, upon proof that *ſome pa-* "*pers* have been thrown into the ſea, without inquiring "what thoſe papers were, or by whom thrown; and "though ſufficient remain to prove that the ſhip and "cargo belonged to friends or allies." In the *procès verbal* it was expreſsly ſtated, "that the ſhip going to "an enemy's country, and the loſs of her papers, by "falling

'voyage to an 'enemy's port, 'with goods 'conſigned to 'perſons there, 'though ſtated 'in the bills of 'lading to be- 'long to neu- 'trals, and there- 'being *reaſon to* 'ſuſpect that the 'captain had 'thrown his pa- 'pers overboard, 'therefore the 'ſhip and car- 'go are con- 'demned as 'prize.' This being ambiguous, and there appearing reaſon to ſuppoſe that the ground of the ſentence was the throwing the papers overboard, contrary to a *French* ordinance, this was held not to be concluſive evidence to falſify the warranty.

Bernardi v. *Motteux*, *Doug* 554.

" falling into the ſea, raiſing ſuſpicions, ſhe was ſtopped " *in conſequence of the third article of the regulation of the* " *26th of July* 1778, *concerning neutral ſhips.*"—Upon this caſe it was contended on the part of the plaintiff, that the condemnation was not founded on any proof that the property was not neutral, but on the authority of the *arrêt*, on account of the papers having been thrown into the ſea. If this had been done wilfully it would have been fraud, or barratry, in the maſter, which was one of the riſks inſured againſt; but it was no evidence of enemy's property.—For the defendant it was inſiſted that, though the ſentence did not, in words, declare the ſhip and cargo to have been condemned, *as enemy's property*, which it is not the practice to do; yet that that appeared, from neceſſary inference, to have been the ground of the condemnation; and throwing the papers into the ſea *was only evidence* of that fact.—Mr. Juſtice *Buller* being of opinion that, *on the caſe, as ſtated, without the procés verbal*, the interpretation of the ſentence was, that the condemnation went on the ground of *enemy's property*, it was propoſed to the defendant to agree that the *procés verbal* ſhould be made part of the caſe, which would explain the ambiguity of the ſentence; by ſhewing the *arrêt* to have been the ground of the capture. This was refuſed by the defendant.—Lord *Mansfield* was of opinion, however, that the juſtice of the caſe might ſtill be got at, on the ground of the ambiguity of the ſentence, which did not mention a word of *enemy's property*; that it was clear the *French* admiralty meant to proceed on the ground of *throwing the papers overboard*; and that the *procés verbal* ought to be conſidered as part of the proceedings, and that the ſentence ought not to have been read without it.—It being alledged by the defendant's counſel, that it would be dangerous to open the ſentences of foreign courts of admiralty, which are uſually informal; and that the conſequence of this deciſion would be that, in all caſes of this ſort, there would be controverſies about the ground of the foreign ſentence, Lord *Mansfield* ſaid that this ſuppoſed inconvenience would be entirely

entirely obviated if the foreign courts would ſay, in their ſentences, "*Condemned as enemy's property.*"—Mr. Juſtice *Wilkes* and Mr. Juſtice *Aſhhurſt* concurred with Lord *Mansfield*, and there was judgment for the plaintiff, Mr. Juſtice *Buller* ſtill adhering to his former opinion.

But ſo great, in our courts, is the authority of the ſentence of a foreign court of admiralty, that if it be there decided that a ſhip or goods are enemy's property, ſuch ſentence, though manifeſtly unjuſt, will be received as concluſive evidence to diſprove the warranty of neutral property. In the following caſe this point was, upon full conſideration, ſolemnly ſettled.

But a ſentence of condemnation as enemy's property is concluſive, though manifeſtly unjuſt.

An inſurance was made on the freight of the ſhip *Rainbow*, "At and from *Charleſtown* to *London*, *warranted American property.*" In an action on this policy, brought to recover a total loſs by capture, it appeared on the trial, that the plaintiff, who reſided at *Charleſtown*, was the ſole owner of the ſhip, which took in a cargo at that place upon freight for the voyage deſcribed in the policy; that ſhe ſailed on this voyage under the command of *William Smith*, a naturalized ſubject of the *United States*, on the 18th of *January* 1796; and on the 25th of *March* 1797, was captured by a *French* privateer, carried into *Nantz*, and there condemned and ſold: That, at the time of her ſailing, and till the capture, ſhe had on board a proper regiſter as an *American*-built veſſel, a paſſport or ſea-brief duly certified, and the ſeveral other documents referred to in the ſentences of condemnation; but ſhe had no certified *role d'équipage* or liſt of her crew. The plaintiff offered to prove that he was born within the *United States*, and was domiciled there from his birth, and that the ſhip and freight were his ſole property.—On the other hand, there was produced a ſentence of condemnation, by the commercial tribunal at *Nantz*, which, after ſtating at great length the mutual allegations of the parties, concludes to the following effect; 'Conſidering that the decree of the *Executive Directory*, 'of the 12th *Ventoſe* laſt, declares lawful prize all *Ame*-'*rican* ſhips not having a liſt of their crews, conformably 'to the model annexed to the treaty of *February* 1778 'between

A ſhip warranted *American*, was condemned as enemy's property, for not having on board a liſt of the crew, ſuch as is required by a marine ordonnance of *France*, and adjudged by the court there to be requiſite within the meaning of the treaty of commerce between *France* and *America*. The ſentence is concluſive evidence againſt the warranty, though in fact the ſhip and cargo were *American* property.

Geyer v. *Aguilar*, 7 T. R. 631.

'between *France* and *America*, and that there was not 'on board the *Rainbow* ſuch a liſt of the crew, but only 'a ſea letter, on the back of which was an agreement 'ſubſcribed by only ſeven of the crew; and that the 'captain produced only bills of lading without ſignature, '—the tribunal therefore adjudges the validity of the 'capture and confiſcation of the ſhip and cargo, *the 'whole being, for want of captain Smith's having the papers 'in due form, decreed to belong to the enemies of the republic,* '&c."—This ſentence, upon appeal to the tribunal of the department, was confirmed, and the appellant condemned to pay coſts.—The ordinance of *October* 1744 was produced, declaring all ſhips prize which ſhould have on board any officer, a ſubject of the enemy's country; or which ſhould not have on board a muſter roll of the crew ſtated by the public officer of the neutral port of departure. The treaty of *February* 1778 between *France* and the *United States* was alſo produced, the 12th, 25th, and 27th articles of which require that, when either power is at war, the ſhips of the other ſhall be obliged to carry paſſports, and certificates to ſhew that the goods on board are not contraband; alſo a liſt of the crew, containing their names, places of birth and abode.—It was admitted that, previous to the capture of this and other ſhips for want of the *role d'équipage*, no ſuch roll had ever been deemed neceſſary; but that, ſince then, they have been in uſe.—The queſtion, upon this caſe was, whether the ſentences of condemnation, connected with the treaty, the *French* ordinances and decrees, were to be deemed concluſive againſt the truth of the warranty.—The court determined, that as the *French* court had concluded, from the evidence, that this was *enemy's property*, and as that judgment was binding upon the courts here, they were obliged to draw the ſame concluſion; and that therefore, as the property warranted to be *American* property, muſt now be taken not to have been ſuch, the plaintiff could not recover.—Lord *Kenyon* ſaid,—"We come to decide this caſe bound and ſhackled by certain rules from which we dare not depart. The acts of pirates are to be treated as the acts of pirates: They

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do not profeſs to have any civil code of laws by which they are to be reſtrained. But civiliſed nations profeſs to be governed by certain rules; and the comity due from the courts in one country to thoſe of another, induces them to give credit to each other's acts (*a*); and ſo we muſt continue to act in this country, until the legiſlature ſhall think fit to forbid it. I admit the caſes of *Mayne* v. *Walter* (*b*), and *Saloucci* v. *Johnſon* (*c*), up to their extent. I admit that, if a foreign court of admiralty proceed on grounds contrary to the law of nations, its judgments ought not to have weight in the courts of this country. But the ground on which the courts of *France* proceeded in this caſe was, that this was a capture of *enemy's property*; and it certainly is not contrary to the law of nations to condemn a ſhip on that ground. Whether or not thoſe courts arrived at that concluſion by proper means, I am not at liberty to enquire. Here the queſtion is, whether they have not ſtated, as the foundation of the condemnation, a ground which will not bear them out, ſuppoſing it to be true; and I am clearly ſatisfied that they have. They concluded from the evidence that this was enemy's property; not, indeed, in the formal language of our courts of juſtice, but they ſay, in ſubſtance, "We think this is enemy's property, and therefore we "condemn the ſhip and cargo." Now that concludes this caſe; for as long as the foreign judgments are binding upon us, the concluſion that we muſt draw from the judgments of the *French* courts, in this caſe, is, that the property which was warranted to be *American*, is found by thoſe judgments not to have been *American* property. I feel this, however, as the groſſeſt injuſtice towards the *Americans*. The *French* courts ſeem, in this inſtance, to have proceeded on *Algerine*, nay on worſe, principles; becauſe they profeſſed to have proceeded according to law, but in reality made the law a ſtalking-horſe for an act of piracy. But I cannot now queſtion the legality of their deciſion: I am bound to decide according to law. It is

(*a*) Vid Sup. 288.—(*b*) Inf. 302.—(*c*) Inf. 301.

my

my duty *jus dicere, non jus dare.*"—The other judges concurred in theſe ſentiments.

The ſentence of a foreign court of admiralty is only concluſive as to the points which it profeſſes to decide.

But though the ſentence of a foreign court of admiralty poſſeſs ſuch great authority in our courts, that it is conſtantly received as concluſive evidence, as to the points which it profeſſes to decide, yet it muſt be obſerved that its authority is confined to thoſe points alone; and nothing but the matters *expreſsly decided* can be taken as incontrovertible. A fact, therefore, recited in ſuch ſentence, though it be a part of the premiſes on which the adjudication is founded, is not conſidered as concluſive.

Chriſtie v. *Secretan*, 8 T. R. 192. inf.

Thus: In an action on a policy on goods on board an *American* ſhip, it appeared that the ſhip had been condemned as prize by a *French* court of admiralty, becauſe, as the ſentence expreſſed it, ſhe was *looked upon* as belonging to the enemies of the *French* republic. Many reaſons were aſſigned in the ſentence for this deciſion, particularly that the ſhip's ſea papers were not in the regular order for an *American* ſhip. It was objected that the ſhip, being an *American*, though not warranted neutral, ought to have ſailed with all the documents neceſſary to ſuch a ſhip, and the want of any of theſe avoided the contract.—But the court ſaid that, though they were bound to conſider the ſentence as concluſive, as to the *point decided* in it, namely, *that the ſhip was enemy's property*; yet, as it did not *decide* that ſhe had not the neceſſary documents for an *American* ſhip, but only recited that, as one *reaſon* for the ſentence, they held that the plaintiff was intitled to recover.

3. *What ſhall amount to a forfeiture of Neutrality.*

This warranty muſt not only be true at the time when the policy is effected, but the inſured ſhould take care that he do not, by any act or omiſſion on his part, forfeit his neutrality. Such forfeiture, by the wilful act of the maſter or mariners, though in ſome inſtances it may amount to barratry, is a breach of the warranty, and avoids the policy from the time it is committed; nor can

can the insured recover upon it for any loss happening afterwards, though it proceed from a cause wholly unconnected with the warranty *(a)*. For it is of little importance to the insurer whether a ship be liable to capture, as being enemy's property, or for having forfeited her neutrality.

A ship may forfeit her neutrality by any act done or attempted against the law of nations, or in contravention of particular treaties, and injurious to either of the belligerent powers.

What act shall be of this description, and amount to a forfeiture of neutrality is frequently a question of much doubt and difficulty.

The causes of the forfeiture of neutrality are generally, *first*, the resisting of visitation and search; and, *secondly*, sailing without proper documents, and acting in contravention of particular treaties. Of these in their order.

First, Of the forfeiture of neutrality *by resisting visitation and search.*

The most frequent cause of dispute upon this subject is the refusal of neutral ships to submit to visitation and search by belligerent cruisers. It has been holden that a neutral is not bound to submit to such search; and that searching, being an act of superior force, rather than the exercise of a right, the neutral may always resist it, when he can do so with effect; and that such resistance is therefore no cause of forfeiture of neutrality.

It has been holden that a neutral is not obliged to submit to a search; but may lawfully resist it with force.

That was the case of an insurance on the ship *Thetis*, belonging to *Tuscan* subjects resident at *Leghorn*, on a voyage from *Leghorn* to *London*.—The ship, having *neutral goods* on board consigned to *London*, was captured, carried into *Spain*, and there condemned as lawful prize. The sentence of condemnation was appealed from by the captain and reversed; but afterwards confirmed upon a further appeal by the captors. Two grounds of condem-

Salvucci v. *Johnson*, B. R. Hil. 25 *G.* III. MS. S. C. *Park* 363.

(a) R. *Woolmer* v. *Muilman*, 4 *Bur.* 1419, 1 *Bl.* 427.

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nation appeared in the ſentence. 1ſt. That the ſhip refuſed to be ſearched, and reſiſted with force, having fired at the *Spaniſh* ſhip; 2dly, that ſhe had no charter-party on board; *both contrary to the Spaniſh cruiſing orders.* To theſe the captain anſwered, 1ſt. That he reſiſted and fired, becauſe the *Spaniard* had hailed him under falſe colours, whereby he took her for a *Barbary* corſair; 2dly, that the *Thetis* was a general ſhip, and he had taken the goods on board by the bale or piece, and had not freighted the ſhip to any individual; in which caſe a *manifeſt* was ſufficient, without a charter-party. The ſentence of the laſt court of appeal *admitted the ſhip to be neutral*, by ſtating her to be a *Tuſcan* ſhip.—Upon this caſe, the court (*a*) were clearly of opinion that the plaintiff was entitled to recover, and gave judgment accordingly.—In the argument, the defendant's counſel gave up the ſecond ground of condemnation, as untenable.—Upon the firſt, the judges agreed that a ſhip, warranted neutral, muſt ſo conduct herſelf as not to forfeit her neutrality; and that if, by the wilful act of the captain, ſhe do this, to the injury of the owners, it will amount to the offence of barratry: But in this caſe, nothing of that kind was imputable to him. That *a neutral ſhip is not bound to ſubmit to be ſearched*, ſearching being an act of ſuperior force, rather than the exerciſe of a right, which may always be reſiſted when the party is able; and the ſearcher who acts at his peril, always pays coſts, unleſs he finds ſomething on board to juſtify him, like the caſe of cuſtom-houſe officers: That this was confirmed by the practice of the admiralty, where coſts are always given in caſes of improper detention, which would not be done if neutral ſhips were liable, at all events, to be ſtopped: That, in the preſent caſe, there was nothing to juſtify the ſearch, the cargo being neutral: That a ſhip is only bound to take notice of the laws of the countries from which, and to which, ſhe ſails; but not the particular ordinances of

(*a*) Viz. *Willes*, *Aſhurſt*, and *Buller*, Js. Lord *Mansfield* being abſent.

other

other powers; and that a detention, therefore, under the authority of particular ordinances which do not make a part of the law of nations, was a risk within the policy."

The ground of this decision seems to have been that, as the capture and condemnation of the ship insured were only warranted by the particular ordinances of the *Spanish* government, the sentence was no evidence to prove that the ship had forfeited her neutrality. Observations on this case.

What the particular ordinances alluded to were, does not appear. The sentence stated that the ship had refused to submit to a search, and had resisted with force, *contrary to the Spanish cruising orders*. If those cruising orders directed that a neutral ship which should resist a search should be seized and confiscated, the question would then have been, whether such orders were warranted by the law of nations; for if they were, the resistance was a forfeiture of neutrality, and a just ground of capture and confiscation.

That the law of nations does give to every belligerent cruiser the right of visitation and search, and that a resistance to such search amounts to a forfeiture of neutrality, seems to have been the opinion of the same court in the following more recent case. But it has since been holden that a resistance to search is a breach of neutrality.

That was the case of an insurance on goods on board the *Dispatch*, "At and from the island of *St. Thomas* to "the *Havannah*; the ship and goods warranted *Danish* "property."—In an action on this policy, to recover a total loss by capture, it appeared,—That the ship and goods insured were the property of *Danish* subjects resident at the *Danish* island of *St. Thomas*, and that, when the ship sailed on the voyage insured, she had on board all the ship's papers usually carried by *Danish* ships: That the ship was captured by the *Pelican*, an *English* man of war, and condemned by a sentence of the *British* vice-admiralty court at *St. Domingo*, which stated, 'That the 'said neutral ship *Dispatch*, with the cargo on board, 'being *Danish* property, had been, under the law of na- 'tions and of war, and agreeably to existing treaties, 'stopped and detained by the captain of the *Pelican*, and 'sent

A court of admiralty condemns a ship and cargo, because the master and crew had forcibly rescued the ship from a prize-master sent with her into port by a belligerent cruizer, for the purpose of search:—This is a breach of the ship's neutrality, and conclusively proved by the sentence of a court of admiralty condemning her upon that ground.

Garrels v. *Kensington*, 8 T. R. 23.

'ſent by him to the port of *Molt St. Nicholas*, for the 'purpoſe of being legally examined, under the command 'of a midſhipman, as prize-maſter, with two ſeamen: 'That, on the near approach of the ſaid ſhip to that 'port, the maſter and crew of the *Diſpatch*, had, *in di-* 'rect violation and breach of their neutrality, as* Daniſh *ſub-* 'jects, and contrary to the law of nations, and the faith of 'treaties, violently and forcibly, at a preconcerted ſignal, 'ſeized and taken poſſeſſion of the ſaid ſhip and cargo 'from the ſaid prize-maſter and ſeamen, and had re- 'tained poſſeſſion thereof till again captured by a *French* 'privateer; and that ſhe was afterwards recaptured by 'the *Pelican.*' The judge then, after ſtating his reaſons at large, adjudges and decrees the ſhips and cargo to be lawful prize, &c.—On the part of the plaintiff it was contended, that the ſentence did not negative that the ſhip and cargo were originally neutral; but only ſtated facts from which the court concluded that ſhe afterwards forfeited her neutrality; and that theſe facts, when examined, would not warrant that concluſion, *Daniſh* ſhips not being bound, by any treaties with *England*, to ſubmit to be ſearched, much leſs to be violently taken poſſeſſion of, and carried out of the courſe of their voyage for that purpoſe; and that, by the law of nations, a neutral ſhip was not bound to ſubmit to be ſearched, according to the deciſion in the caſe of *Salaucci* v. *Johnſon* (*a*). But the court decided that the ſentence was concluſive evidence that the ſhip had been guilty of a breach of her neutrality, and that, therefore, the plaintiff was not intitled to recover.—Lord *Kenyon* ſaid,—"The caſe of *Salaucci* v.

(*a*) Sup. 301.—Another point was made by the plaintiff's counſel, viz. that even if ſuch a right of ſearch did exiſt, the act of the captain and crew in reſiſting it would at moſt amount to barratry, for which the underwriter would be liable. But this was anſwered by ſhewing that there was no count in the declaration for a loſs by barratry.

Johnſon,

Johnſon profeſſed, at laſt, to proceed on this ground, that the arbitrary ordinances of one country ought not to conclude the rights of the ſubjects of another; and that courts of juſtice ought to proceed on the acknowledged law of nations, and on the exiſting treaties between the different ſtates. That caſe ſays that a ſhip, which is warranted neutral, muſt be ſo conducted as not to forfeit her neutrality. But was this ſhip ſo conducted? The ſentence of the court of admiralty, which we cannot review, has expreſsly ſtated, "that the maſter and "crew of the *Diſpatch*, in direct violation and breach of "their neutrality, as *Daniſh* ſubjects, and contrary to "the law of nations and the faith of treaties, violently "ſeized and took poſſeſſion, &c." If we had conſtituted that court, perhaps we might have drawn a different concluſion from the facts there ſtated: But we are now concluded by that ſentence. Therefore, without contradicting the caſe of *Saloucci* v. *Johnſon*, I think the defendant is intitled to our judgment. With regard to the queſtion concerning the right of ſearching neutrals: Before the late armed neutrality, it was conſidered in this country, and ſo decided in many caſes, that the right of ſearching neutrals is part of the law of nations; and it was ſuppoſed to be founded in reaſon."—Mr. Juſtice *Lawrence* ſaid,—"The argument founded on the caſe of *Saloucci* v. *Johnſon* proceeds on a ſuppoſition that a point was there decided, which, in fact, was not decided: It was not there determined that this court can review the ſentence of a court of admiralty, adjudging that a ſhip had forfeited her neutrality (*a*); for it was not there adjudged by the court

(*a*) The point there determined was, in ſubſtance, that the ſhip was juſtified in reſiſting a ſearch, and that the ſentence of the *Spaniſh* court of admiralty, being founded on the particular ordinances of that country, which made no part of the law of nations, was not concluſive to prove the legality of the capture.—If the ſhip did in fact forfeit her neutrality by the law of nations, the ſentence was well founded; and its being ſtated in the ſentence that this reſiſtance was contrary to the *Spaniſh* ordinances does not deſtroy its validity, if warranted by the law of nations.

of admiralty that the ſhip had forfeited her neutrality. But looking into the grounds of this ſentence, we cannot but ſee that the ſhip was condemned for having violated her neutrality, and acted contrary to the law of nations and the faith of treaties."

The queſtion, as to the right of viſitation and ſearch, and the conſequences of reſiſting, conſidered.

As oppoſite doctrines have been advanced in theſe two caſes upon a very important queſtion of the law of nations, I think it will not be improper in this place to enquire, whether, according to the practice of paſt times amongſt the maritime ſtates of *Europe*, and the opinions of the perſons moſt eminent for their learning in that law,— *Cruiſers, legally commiſſioned, have a right to viſit and ſearch neutral ſhips at ſea; and whether a reſiſtance to ſuch ſearch amounts to a forfeiture of neutrality.*

Law of nations defined.

It may be proper here to premiſe that the law of nations does not conſiſt of the arbitrary ordinances of particular ſtates, dictated by intereſt, and ſupported only by force; but of thoſe principles and regulations founded in reaſon and general convenience, by which the mutual intercourſe between independent ſtates is every where conducted; and from which none can depart without offending againſt civil ſociety itſelf. What thoſe principles and regulations are, is to be collected from long eſtabliſhed practice amongſt civilized ſtates, which hiſtory has tranſmitted to us, and learned men have reduced to a ſyſtem.

Doctrine of *Hubner*.

M. *Hubner*, in the year 1759, publiſhed his treatiſe, *De la faiſie des batimens neutres*, compoſed for the purpoſe of juſtifying the northern powers in ſupplying the *French* with naval ſtores, without interruption from *Great Britain*. It is evidently a party production, more remarkable for its ingenuity, than for candour or fair reaſoning. It propoſes to prove, that *free ſhips make free goods*, that *the flag covers the cargo*, and therefore that *neutral ſhips, acknowledged as ſuch, cannot be ſeized at ſea, though they be laden with contraband of war, or with enemy's goods* (*a*).

Two or three authorities, however, will ſuffice to remove all doubt upon this queſtion.

(*a*) Vid. *Hubner* de la ſaiſ. des batim. neut. part. 1, c. 8, § 3.

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In the *Conſolato del mare* (*a*), one of the moſt ancient collections of marine laws now extant, it is laid down *firſt*, that if enemy's goods be found on board of neutral ſhips, they may be taken, the captor paying the freight, and any other claim the captain of the neutral ſhip may have upon them; *ſecondly*, that if neutral goods be found on board of an enemy's ſhip, the ſhip may be taken and the goods reſtored, the owner of them paying the freight. Of the *Conſolato del Mare.*

Grotius, who cites this paſſage, does not afford much ſatisfaction on this queſtion: *Bynkerſhoek*, however, was decidedly of opinion, that belligerent cruizers were warranted by the law of nations in viſiting neutral ſhips, in order to examine their papers and ſeize enemy's property, if any ſhould be found on board: But he denies that the captor is bound to pay the freight or any other charge to the neutral captain, as laid down in the *Conſolato del mare* (*b*). Of *Bynkerſhoek.*

Vattel,

(*a*) Ch. 273.—(*b*) After a review of the ſeveral treaties between particular ſtates upon this ſubject, by which it is ſtipulated that *free ſhips ſhall make free goods*, which *Bynkerſhoek* ſays, are only exceptions to the general law, he proceeds thus:—'Sed quicquid ſit, de ipſa ratione magis, quam de pactis, laborandum eſt. Eâ autem conſultâ, non ſum, qui videam, cur non liceret capere res hoſtiles, quamvis in navi amica repertas, id enim capio, quod hoſtium eſt, quodque jure belli victori cedit. Sin ajas, me non rectè occupare res hoſtiles in navi amica, niſi prius occupem navim amicam, atque ita vim faciam rei amici, ut deprehendam rem hoſtis, idque non magis licere quam hoſtes noſtros aggredi in amici portu, vel deprædari in territorio amici, velim animadvertas eatenus utique licitum eſſe amicam navem ſiſtere, ut non ex fallaci forte apluſtri, ſed ex ipſis inſtrumentis, in navi repertis, conſtet, navem amicam eſſe. Si id conſtet, dimittam, ſi hoſtilem eſſe conſtiteret, occupabo. Quod ſi liceat, ut omni jure licet, et perpetuo obſervatur, licebit quoque inſtrumenta, quæ ad merces pertinent, excutere, et inde diſcere, an quæ hoſtium bona in nave lateant, et ſi lateant, quidni ea jure belli occupem.—De eo ſane non dubitant leges maritimæ *in Conſulato maris*; ſecundum has enim navis amica dimittitur, res hoſtiles in portum victoris productæ publicantur. Sed rurſus rationem non habet, quod ibi additur, opportere victorem magiſtro navis amicæ ſolvere mercedes ſive vecturæ pretia, quia hæc non debentur

Of *Vattel.*

Vattel, a *French* author of the first eminence, maintains, by irrefragable arguments, not only the right of visitation and search, but also that a neutral ship which should resist such visitation and search, may for that cause alone, be seized and condemned as lawful prize (*a*).

French ordinances.

Yet the *French* seem to have been always governed by their own laws upon this subject, without much regard to that which might be deemed the law of nations; and it is curious to observe how their regulations have fluctuated, from time to time, under the influence of an interested policy.

According to the antient laws of *France*, a neutral ship was always confiscated which was taken with enemy's goods on board; but with an exception in favour of the *Hans Towns* (*b*).

By the ordinance of 1543, art. 42, and that of 1584, art. 69, every neutral ship, in which should be found any enemy's goods, and all goods found in an enemy's ship, though belonging to an ally, were declared good prize (*c*).

But the rigour of these regulations was mitigated by a declaration of *February* 1650, which directs that the goods of the friends and allies of the king, captured by his subjects, should be restored.

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bentur nisi perductis mercibus ad locum destinatum. Si causaris, per magistrum non stetisse quo minus eo perduxerit, verum dicis; sed magister, suo periculo, merces hostiles navi fugæ imposuit, gnarus, eas capi, et sic in portum capientis perduci posse. Nihil igitur habebit querelarum, si sola navis demittatur, nisi inter eum et victorem convenerit, ut ipse merces hostiles deferat ad locum destinatum, translata sic in victorem causa locationis conductionis. Quæst. jur. pub. lib. 1, c. 14.—(*a*) Vid. *Vattel*, droit des gens, liv. 3, c. 7, art. 113, 114.—(*b*) Vid. *Bynk.* quæst. jur. pub. lib. 1, c. 14.—(*c*) Vid. *Emerig.* t. 1, p. 450.—*Hubner de la saisie des batim. neut.* part. 1, c. 4, § 7, after animadverting upon the severity of the *Romans*, towards persons carrying on trade with their enemies, proceeds thus:—'Les sentimens et la conduite de la *France*, 'ont été, dans les siécles precedens, bien plus équitables à ce 'sujet. Son gouvernement n'a jamais prétendu troubler la na-

'vigation

The famous ordinance of the marine of 1681 (*a*), reſtored the ancient ſeverity, and declared that all ſhips laden with enemy's goods, and all goods, either of the king's ſubjects or of his allies, which ſhould be found in enemies' ſhips, ſhould be good prize.

And, by an order of council, dated in *October* 1692, it is commanded, that the above article of the ordinance of 1681, ſhould be executed according to its tenor and form, without any diſtinction, modification or reſtriction, unleſs authorized by the king's particular order.

By a regulation of *July* 1704, it was likewiſe ordered, that if any enemy's goods ſhould be found in any neutral ſhip, the ſhip and all her cargo ſhould be good prize.

This rigour was again ſoftened by a regulation of *October* 1744, which directs that enemy's goods found on board of neutral ſhips, ſhould be good prize; but that the ſhips themſelves ſhould be releaſed; and we ſhall preſently ſee them carrying this mild principle ſtill farther.

Several northern nations, deſirous of carrying on an unreſtrained commerce with all belligerent powers, and of avoiding the inconvenience of having their veſſels ſtopped and ſearched at ſea, have, in many inſtances, introduced, by their particular treaties, a new principle, namely, that *free ſhips make free goods*: But this was nothing more than controuling, in particular caſes, the general principles of the law of nations, by ſpecial compacts which were binding only upon thoſe who were parties to them. But, as a general rule, *Great Britain* has always de- Northern confederacy.

'vigation et le commerce ordinaire des états neutres avec ſes en-'nemis. Ou n'a qu'à voir là deſſus le 42me. chapitre de ſon 'ordonnance de l'année 1543, confirmé par celle de l'année 1584, 'et l'on trouvera que ces réglemens ſont bien conformes aux 'arrêts du code univerſel des ſociétés ſouveraines ſur cette ma-'tiére;'—Let this extract ſuffice at once as a ſpecimen of M. *Hubner's* candour and veracity, and as a proof of the view with which his treatiſe was compoſed.—(*a*) Tit. des priſes, art. 7.

plied this new doctrine, and inſiſted on the ancient principle. During the *American* war, in which *Great Britain* ſtood alone againſt *France*, *Spain*, *Holland*, and her own revolted colonies, *Ruſſia*, *Sweden*, *Denmark*, and other inferior ſtates, formed a league mutually to ſupport each other in repelling the right claimed by the *Engliſh*, and in ſupporting what the *French*, ſince their revolution, have called the *modern law of nations*.

The empreſs of *Ruſſia* who put herſelf at the head of this aſſociation, cauſed a declaration, dated the 28th of *February* 1780, to be delivered to the miniſter of each of the belligerent powers, to this effect:—"That neutral ſhips ought to be at liberty to navigate freely from port to port, and upon the coaſts of the nations at war: That the goods and effects of the ſubjects of the belligerent powers ſhould be free, with the exception of contraband goods: That no goods ſhould be conſidered as contraband but ſuch as were ſpecified in the 10th and 11th articles of the treaty of commerce, between *Ruſſia* and *Great Britain*, dated the 20th of *June* 1766: That to aſcertain what ſhould be deemed a blockaded port, it was determined, that none ſhould be admitted to come within that deſcription, but ſuch only where, by reaſon of the near approach of the ſhips employed in the attack, there was an apparent danger that they would be able to enter it: And finally, that theſe principles ſhould ſerve as a baſis for all proceedings and judgments upon the legality of prizes."

The empreſs ordered her fleets to arm in ſupport of this new doctrine, and *Sweden* and *Denmark* followed her example. Thus was formed what was called the *armed neutrality* of the North. It was a blow aimed at once at the ancient maritime juriſprudence of *Europe*, and the naval ſuperiority of *Great Britain*, which *France*, either foreſeeing or being privy to, anticipated by a declaration dated the 26th of *July* 1778, in which it was ordered,—"That no neutral ſhips ſhould be ſtopped or brought into the ports of *France*, though they ſhould be coming from, or going into, the ports of the enemy, except

except ſuch as ſhould be bringing ſuccours to places blockaded, inveſted, or beſieged: That as to neutral ſhips which ſhould be laden with contraband goods deſtined for the enemy, they might be ſtopped and the goods ſeized and confiſcated; but that the ſhips themſelves, and the reſt of their cargoes ſhould be releaſed, unleſs the contraband goods ſhould amount to three-fourths in value of the cargo; in which caſe the ſhip and the whole cargo ſhould be confiſcated; the king reſerving to himſelf the power of revoking this liberty, if the enemy, within ſix months, ſhould not make a ſimilar conceſſion."

But though *Great Britain* never made any conceſſion of a ſimilar kind, yet the *French* did not revoke theirs, except with reſpect to the *Dutch*, whom they were then endeavouring to force into the war.

The ſucceſs which unfortunately attended this armed neutrality has, in the preſent war (*a*), given birth to a ſimilar attempt in the ſame quarter. But the vigour and ability by which the views of this new confederacy have been fruſtrated, reflect equal honour on thoſe who, at that time, directed the councils of this kingdom, and on the gallant perſons who executed their orders. Their ſpirited exertions, happily for this country, have not only vindicated the ancient ſyſtem, but have taught thoſe who would ſubvert it, that the attempt can never again be made with impunity, ſo long as ſhe retains her naval ſtrength. Little, indeed, would that ſtrength avail, were ſhe again tamely to yield up this important point.

Should the leaſt doubt remain in any impartial mind as to the admiſſibility of the principle which this country contends for, it muſt vaniſh upon the peruſal of the following judgment delivered in our Court of Admiralty by a learned perſon, whoſe virtues and talents cannot fail to excite the veneration and applauſe of all *Europe*.

Judgment of the court of Admiralty in the caſe of the ſhip *Maria*.

That judgment was delivered in the caſe of the ſhip *Maria* (*b*), one of ſeveral *Swediſh* veſſels, ſailing under

(*a*) This was written in *Auguſt* 1801.—(*b*) Doctor Robinſon's reports of admiralty caſes, vol. 1.

the envoy of a Swedish frigate condemned, after ſolemn argument, for reſiſting viſitation and ſearch.—The learned judge, after ſtating and commenting upon the facts of the caſe which it is not neceſſary here to detail, proceeds thus:—"This being the actual ſtate of the facts, it is proper for me to examine to what conſiderations they are juſtly ſubject, according to the law of nations; for which purpoſe I ſhall ſtate a few principles of that ſyſtem of law which I take to be incontrovertible.—1ſt. *That the right of viſiting and ſearching merchant-ſhips upon the high-ſeas, whatever be the ſhips, whatever be the cargoes, whatever be the deſtinations, is an inconteſtible right of the lawfully commiſſioned cruiſers of a belligerent nation.* I ſay, be the ſhips, the cargoes, and the deſtinations what they may; becauſe, till they are viſited and ſearched, it does not appear what the ſhips, or the cargoes, or the deſtinations are; and it is for the purpoſe of aſcertaining theſe points, that this right of viſitation and ſearch exiſts. This right is ſo clear in principle, that no man can deny it who admits the legality of maritime capture; becauſe, if you are not at liberty to aſcertain, by ſufficient enquiry, whether there be property that can legally be captured, it is impoſſible to capture. Even thoſe who contend for the inadmiſſible rule that *free ſhips make free goods*, muſt admit the exerciſe of this right, at leaſt for the purpoſe of aſcertaining whether the ſhips be free ſhips or not. The right is equally clear in practice; for the practice is uniform and univerſal upon the ſubject. The many *European* treaties which refer to this right, refer to it as pre-exiſting, and merely regulate the exerciſe of it. All writers upon the law of nations unanimouſly acknowledge it, without the exception of *Hubner* himſelf, the great champion of neutral privileges. In ſhort, no man in the leaſt degree converſant with ſubjects of this kind has ever, that I know of, breathed a doubt upon it. The right muſt unqueſtionably be exerciſed with as little of perſonal harſhneſs and of vexation in the mode as poſſible; but ſoften it as much as you can, it is ſtill a right of force, though of lawful force,—ſomething in the nature of civil proceſs, where force is employed, but a lawful

The cruiſers of every belligerent ſtate have a right to viſit and ſearch all ſhips on the high ſeas.

lawful force, which cannot be lawfully reſiſted. For it is a wild conceit, that wherever force is uſed, it may be forcibly reſiſted. A lawful force cannot lawfully be reſiſted. The only caſe where it can be ſo, in matters of this nature, is in the ſtate of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative ſituation of two countries at peace with each other, no ſuch conflicting rights can poſſibly coexiſt. — 2dly. *That the authority of the ſovereign of the neutral country being interpoſed in any manner of mere force, cannot legally vary the rights of a lawfully commiſſioned belligerent cruiſer:* I ſay *legally*, becauſe what may be given, or be fit to be given, in the adminiſtration of this ſpecies of law, to conſiderations of comity, or of national policy, are views of the matter, which, ſitting in this court, I have no right to entertain. All that I aſſert is, that *legally* it cannot be maintained, that if a *Swediſh* commiſſioned cruiſer, during the wars of his own country, has a right, by the law of nations to viſit and examine neutral ſhips, the king of *England*, being neutral to *Sweden*, is authorized by that law to obſtruct the exerciſe of that right with reſpect to merchant ſhips of his country. I add this, that I cannot but think that if he be obſtructed by force, it would very much reſemble, (with all due reverence be it ſpoken), an oppoſition of illegal violence to legal right. Two ſovereigns may unqueſtionably agree, if they think fit, as in ſome late inſtances they have agreed (*a*), by ſpecial covenant, that the preſence of one of their armed ſhips, along with their merchant-ſhips, ſhall be mutually underſtood to imply that nothing is to be found in that convoy of merchant-ſhips, inconſiſtent with amity or neutrality; and if they conſent to accept this pledge, no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. But ſurely no ſovereign can legally compel the

No neutral ſovereign has a right, by means of force, to deprive a cruiſer of this right.

(*a*) It is made an article of the treaty between *America* and *Holland*, an. 1782, art. 10; *Martin's* treaties, vol. 2, p. 255.

accept-

acceptance of ſuch a ſecurity by mere force. The only ſecurity known to the law of nations upon this ſubject, independent of all ſpecial covenant, is the right of perſonal viſitation and ſearch, to be exerciſed by thoſe who have an intereſt in making it. I am not ignorant that, amongſt the looſe doctrines which modern fancy, under the various denominations of philoſophy and philanthropy, and I know not what, have thrown upon the world, it has been within theſe few years advanced, or rather inſinuated, that it might poſſibly be well if ſuch a ſecurity were accepted. Upon ſuch unauthoriſed ſpeculations, it is not neceſſary for me to deſcant: The law practice of nations, (I include particularly the practice of *Sweden* when it happens to be belligerent), give them no ſort of countenance; and until the law and practice are new modelled in ſuch a *way* as may ſurrender the known and ancient rights of *ſome* nations to the preſent convenience of *other* nations, (which nations may perhaps *remember to forget* them, when they happen to be themſelves belligerent), no reverence is due to them; they are the elements of that ſyſtem which, if it be conſiſtent, has for its real purpoſe an entire abolition of capture in war;—that is, in other words, to change the nature of hoſtility, as it has exiſted among mankind, and to introduce a ſtate of things not yet ſeen in the world, that of a military war and a commercial peace. If it were fit that ſuch a ſtate ſhould be introduced, it is at leaſt neceſſary that it ſhould be introduced in an avowed and intelligible manner, and not in a way which, profeſſing gravely to adhere to that ſyſtem which has for centuries prevailed amongſt civilized ſtates, and urging at the ſame time a pretenſion utterly inconſiſtent with all known principles, delivers over the whole matter at once to eternal controverſy and conflict, at the expence of the hazard of the harmony of ſtates, and of the lives and ſafeties of innocent individuals—3dly. *That the penalty for the violent contravention of this right is the confiſcation of the property ſo withheld from viſitation and ſearch.* For the proof of this I need only refer to *Vattel*, one of the moſt correct, and certainly not the leaſt indulgent of modern

The penalty of reſiſtance to ſearch is the confiſcation of the property withheld from ſearch.

modern professors of public law. He expresses himself thus (*a*): "*On ne peut empecher le transport des effects de* "*contrebande, si l'on ne visite pas les vaisseaux neutres que l'on* "*rencontre en mer. On est donc en droit de les visiter. Quel-* "*ques nations puissantes ont refusé en différens tems de se sou-* "*mettre à cette visite;—aujourd'hui un vaisseau neutre, qui re-* "*fuseroit de souffrir la visite, se feroit condamner par cela seul,* "*comme étant de bonne prise.*" *Vattel* is here to be considered, not as a lawyer merely delivering an opinion, but as a witness asserting the fact,—the fact that such is the existing practice of modern *Europe*. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, on which great part of the law of nations is founded, but of the private jurisprudence of most countries in *Europe*,—that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle we find in the celebrated *French* ordinance of 1681, now in force (*b*), "*That every vessel shall be good prize in case of resist-* *ance and combat;*" and *Valin*, in his smaller commentary (*c*), says expressly, that although the expression is in the conjunctive, yet that the *resistance alone is sufficient* (*d*). He refers to the *Spanish* ordinance of 1718, evidently copied from it, in which it is expressed in the disjunctive,—"in case of resistance *or* combat." And recent instances are at hand and within view, in which it appears that *Spain* continues to act upon this principle (*e*). The first time in which it occure to my notice, on the inquiries I have been able to make in the institutes of our own country, respecting matters of this nature, excepting what occurs in the black book of the admiralty (*f*), is the or-

(*a*) Vid. liv. 3, c. 7, sect. 114.—(*b*) Art. 12.—(*c*) p. 81. —(*d*) In some of the treaties of *France* this article is expressly inserted in the disjunctive. Vid. Tr. between *France* and *Hamburgh*, an. 1769.—(*e*) They acted upon this principle in the case of the ship *Thetis*, which was the subject of the above case of *Salloucci* v. *Johnson*; the case, perhaps, to which the learned judge alluded.—(*f*) B. 7 & 8.

der

der of council of 1664 (a), which directs, "That when a ship, met withal by the royal navy or other ship commissionated, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize."—A similar article occurs in the proclamation of 1672. I am aware that in those orders and proclamations are to be found some articles not very consistent with the law of nations, as understood now, or indeed at that time; for they are expressly censured by Lord *Clarendon* (b). But the article I refer to is not of those he reprehends; and it is observable that Sir *Robert Wiseman*, then the King's advocate general, who reported upon the articles in 1673, and expresses a disapprobation of some of them as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying, that it was the rule, and the undisputed rule, of the *British* admiralty. I will not say that that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason,—upon the distinct authority of *Vattel*, upon the institutes of other great maritime countries, as well as those of our own country,—when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation."

(a) Art. 12, vid. *Thurloe's* state papers, vol. 1, p. 424. — (b) Lord *Clarendon's* life, p. 242.

Having

Having fully conſidered the caſes of the forfeiture of neutrality by a reſiſtance to viſitation and ſearch, we now proceed,

Secondly, to ſhew, In what caſes a ſhip may forfeit her neutrality, *by ſailing without proper documents*; or by acting *in contravention of particular treaties* made with either of the belligerent powers.

The meaning of the warranty is, that the ſhip or goods inſured ſhall not only be the *property* of neutral perſons, but alſo that they ſhall be neutral *to the purpoſe of being protected*. The ſhip muſt therefore be navigated according to the law of nations; and ſhe muſt alſo be furniſhed with all the documents and papers which are the evidences of her neutrality, and of her obſervance of the regulations of particular treaties to which ſhe is bound to conform. The meaning of the warranty is that the ſhip ſhall be neutral *to the purpoſe of being protected.*

It may not be improper here to enumerate the various documents and papers, moſt of which are expected to be found on board of every neutral ſhip (*a*). Documents requiſite for neutral ſhips.

1. THE PASSPORT. This is a permiſſion from the neutral ſtate to the captain or maſter of the ſhip to proceed on the voyage propoſed, and uſually contains his name and reſidence, the name, deſcription, and deſtination of the ſhip, with ſuch other matters as the practice of the place requires. This document is indiſpenſably neceſſary for the ſafety of every neutral ſhip. *Hubner* (*b*) ſays that this is the only paper that is rigorouſly inſiſted upon by the *Barbary* corſairs, by the production of which alone their friends are protected from inſult. Paſſport.

2. THE SEA LETTER, OR SEA BRIEF, which ſpecifies the nature and quantity of the cargo, the place from whence it comes and its deſtination. This paper is not ſo neceſſary as the paſſport, becauſe that in moſt particulars ſupplies its place. Sea-letter.

3. THE PROOFS OF PROPERTY, which ought to ſhew that the ſhip really belongs to the ſubjects of a neutral ſtate. If ſhe appear to either belligerent to have been built in the enemy's country, proof is generally required that ſhe was purchaſed by the neutral before, or cap- Proofs of property.

(*a*) Vid. *Hubner de la ſaiſ. des bat. neut.* par. 1, ch. 3, § 10.
(*b*) Ub.

tured

tured and legally condemned ſince, the declaration of war; and in the latter caſe, the *bill of ſale*, properly authenticated, ought to be produced.—Even *Hubner* (*b*) admits that theſe proofs are ſo eſſential to every neutral veſſel, for the prevention of frauds, that thoſe which ſail without them will have no reaſon to complain if they are interrupted in their voyages, and their neutrality even diſputed.

Muſter Roll. 4. THE MUSTER ROLL, which the *French* call *Role d'equipage*, contains the names, ages, quality, place of reſidence, and above all, *the place of birth*, of every perſon of the ſhip's company.—This document is of great uſe in aſcertaining a ſhip's neutrality. It muſt naturally excite a violent ſuſpicion if the majority of the crew be found to conſiſt of foreigners, ſtill more if they be natives of the enemy's country.

Charter Party. 5. THE CHARTER PARTY. This inſtrument ſerves to authenticate many of the facts on which the proof of the ſhip's neutrality muſt reſt, and is therefore extremely neceſſary.

Bill of lading. 6. THE BILL OF LADING, by which the captain acknowledges the receipt of the goods ſpecified therein, and promiſes to deliver them to the conſignee or his order. Of this there are uſually ſeveral duplicates; of which, one is delivered to the captain, one kept by the ſhipper of the goods, and one tranſmitted to the conſignee. This inſtrument, being only the evidence of a private tranſaction between the owner of the goods and the captain, does not carry with it the ſame degree of authenticity as the charter-party.

Invoices. 7. THE INVOICES, which contain the particulars and prices of each parcel of goods, with the amount of the freight, duties and other charges thereon, which are uſually tranſmitted from the ſhippers to their factors or conſignees. Theſe invoices prove by whom the goods were ſhipped, and to whom conſigned. They carry with them, however, but little authenticity, being eaſily fabricated where fraud is intended.

(*a*) Ubi ſup.

8. THE

8. THE LOG BOOK, or ſhip's journal, which contains an accurate account of the ſhip's courſe, with a ſhort hiſtory of every occurrence during the voyage. If this be faithfully kept, it will throw great light on the queſtion of neutrality. If it be in any reſpect fabricated, this may in general be eaſily detected. Log-book.

9. THE BILL OF HEALTH, which is a certificate properly authenticated, that the ſhip comes from a place where no contagious diſtemper prevails, and that none of the crew, at the time of her departure, were infected with any ſuch diſtemper. This bill of health is generally found on board of ſhips coming from the *Levant*; or from the coaſt of *Barbary*, where the plague ſo frequently prevails. Bill of health.

But the want of any of theſe papers is only preſumptive evidence againſt a ſhip's neutrality.

Upon the ſubject of the ſhip's documents, it is to be obſerved that, though by the law of nations the want of ſome of theſe papers may be taken as ſtrong *preſumptive evidence*, yet the want of none of them amounts to *concluſive evidence*, againſt a ſhip's neutrality.

A ſhip warranted neutral muſt be navigated according to the treaties by which ſhe is bound.

It has already been ſaid, that a ſhip warranted neutral, muſt be neutral *to the purpoſe of being protected*; ſhe muſt therefore be navigated, not only according to the law of nations, but alſo in conformity to the particular treaties ſubſiſting between the country to which ſhe belongs and the belligerent ſtates. A ſhip warranted neutral muſt therefore, in order to fulfil the warranty, not only belong to the ſubjects of ſome neutral ſtate, but alſo have all the requiſites to entitle her to the privileges and immunities of ſhips belonging to that ſtate. The following caſe will ſhew that the want of any of theſe, *for any part of the voyage inſured*, though it only ſubjects the ſhip to *ſearch and detention*, will diſcharge the inſurer.

A ſhip inſured from *A.* to *B.*, and from thence to *C.* and *D.*, warranted *American* property, ſails from *A.* to *B.* without the paſſport required by the treaty between *France* and *America*. At *B.* ſhe pro-

An inſurance was made on the ſhip *Atlantic*, "At and "from *London* to *Guernſey*, from thence to the coaſt of "*Africa*, during her ſtay and trade there, and at and "from thence to her port or ports of diſcharge in all or "any of the *Britiſh Weſt India iſlands* and *America*. The "ſhip and goods on board warranted *American* property." —In an action on this policy to recover a total loſs by capture, it appeared, "That the *Atlantic* was an *American*

cures such a passport, but is afterwards captured by the *French* on her passage to *C*:—The insured cannot recover for this loss; though at the time of the capture, the proper passport was on board, and though the ship ought not to have been condemned by the *French* as prize; because she *did not sail* with all requisites to intitle her to the privileges of an *American* ship.

Rich v. *Parker*, 7 T. R. 705, S. C. *Esp.* Rep. 615.

ship, the property of the plaintiff, a native and citizen of the *United States*, and that the goods on board were *American* property. That, by the treaty of 1778, between *France* and the *United States*, it was agreed, 'That 'the ships and vessels belonging to the subjects of either 'ally, should be furnished with sea letters or passports, 'in a form prescribed, expressing the name, property, 'and bulk of the ship, and the name and place of habi-'tation of the master; and that, if the ships of the sub-'jects of either ally should be met with at sea by the 'ships of war of the other, such ships of war, for the 'avoiding of any disorder, should remain out of cannon 'shot, and might send their boats on board the neutral 'merchant ship, to the number of two or three men only, 'to whom the master of such ship should exhibit his 'passport. And that such ship, on shewing such passport, 'should be at liberty to pursue her voyage, so as it should 'not be lawful to molest, search, or give chase to her, 'or force her to quit her intended course:'—That when the ship sailed from *London* for *Guernsey*, this country was at war with *France*; but she had not then on board any passport, made out according to the form prescribed by the treaty; but that when she sailed from *Guernsey*, and until her capture, she had such passport on board, which was exhibited to the captain of the privateer at the time of her capture."—The only question was, whether the warranty, *that the ship and goods were American property*, had been complied with.—The court were clearly of opinion that it was not complied with; and therefore, that the plaintiff was not entitled to recover.—Lord *Kenyon* said, "On the trial, I gave my opinion strongly in favour of the defendant, and I have no reluctance in saying that I continue of the same opinion. Nothing can be clearer than this, that if a ship insured be not sea-worthy, or in a proper condition for sailing, *during any part of the voyage*, nothing that happens afterwards can better her original situation. By the treaty between *France* and *America*, it is agreed that the ships and vessels belonging to the subjects of either ally must be furnished with sea-letters or passports. Now I think the war-

If a ship insured be not in a proper condition for sailing, during only a *part of the voyage*, nothing that happens afterwards can better her original situation.

warranty in this policy, that the ſhip was *American* property, is not ſatisfied merely by ſhewing that in fact ſhe was *American property*. When theſe parties entered into the contract of inſurance, the underwriter was to be indemnified to a certain extent under this warranty: The ſhip was not only not to be liable to riſks ariſing from her not being *American* property, but ſhe was not to be liable to any inconvenience or impediment in her voyage, from her not being in the condition required by the treaty with *France*. The queſtion here is, whether or not this ſhip was in ſuch a ſituation as to be intitled to all the privileges of an *American* flag: I think ſhe was not. It is true, perhaps, that the *French* had no right to confiſcate the ſhip for not having the paſſport on board, if in fact it were proved that ſhe was an *American* ſhip. But, under the terms of this treaty, the *French* had a right to do certain acts which they could not have done, according to the treaty, if the paſſport had been on board; for then the *French* ſhips were not to come within cannon ſhot, nor to chaſe or drive her out of her courſe; and they were not to ſend more than two or three men on board. This negative implies an affirmative, that in caſe ſhe had no paſſport on board, the *French* would have been guilty of no infraction of the treaty, if they had forced this ſhip out of her courſe. By this contract it is intended that the underwriter ſhould not be liable to ſuch riſks: But the ſhip was in fact ſubject to theſe riſks and inconveniences through the neglect of the inſured, becauſe he did not do all that was required by the treaty. Might not this ſhip have been carried into a *French* port, and the voyage been thereby delayed for want of this paſſport, though, perhaps, ultimately ſhe would not have been liable to confiſcation? And is not that a greater riſk than the underwriter engaged to inſure againſt, in the caſe of a ſhip warranted *American?* It is true that the loſs did not happen in conſequence of the ſhip's not having a paſſport, but ſtill the underwriter was put to greater riſk than he would have been put to, if the ſhip had had this document on board."—Mr. Juſtice *Aſhurſt* ſaid,—"The war-

The warranty is not ſatisfied by merely ſhewing that the thing inſured in fact belonged to a neutral.

If a ſhip, for want of a neceſſary document, merely ſubject herſelf to be carried into the port of a belligerent, ſhe falſifies the warranty.

A warranty that a ship is neutral does not merely mean that she was built in the neutral state, but that she is intitled to all the indemnities of the ships of that state.

warranty that the ship was *American* does not merely mean that she was *American-built*, but that she was entitled to all the privileges and indemnities of an *American* ship, otherwise it makes a difference in the value of the risk; and, to entitle her to these privileges, she ought to have had a passport; and if the underwriters had been informed that she could not have one on board, in the first part of the voyage from *London* to *Guernsey*, perhaps he would not have insured for the same premium. —Mr. Justice *Grose* thought the principle established in the cases of *De Hahn* v. *Hartley* (*a*), and *Barzillay* v. *Lewis* (*b*) must decide this.—Mr. Justice *Lawrence* said that the finding of the jury, "that the ship was *American* property," did not amount to a finding, that the warranty had been *complied with*. That if the meaning of the warranty was, that the ship was intitled to all the privileges of an *American* flag, which he thought the fair construction of the policy, then the warranty was not complied with.

But neutrals are not bound to take notice of regulations made by belligerents contrary to the law of nations.

But in every maritime war, the belligerent powers take upon themselves to make various marine regulations, adapted to their own respective situations and interests, but often contrary to the law of nations, and inconsistent with the independence of other states. And though it may be prudent for the subjects of neutral states, which are unable, or unwilling, to contend with such belligerent powers, to conform to these regulations, for their own safety, yet it seems to be now settled, that they are not bound by them; and therefore, a condemnation avowedly grounded on the non-observance of them, will not amount to proof of the forfeiture of the warranty.

If a ship be condemned for forfeiting her neutrality, and upon the face of the sentence it appear not to be a legal cause of forfeiture; this sentence will not be conclusive.

If, therefore, a ship be condemned, by a foreign court of admiralty, for having forfeited her neutrality, and the act for which she has been so condemned, appear on the face of the sentence not to amount to such forfeiture, either by the law of nations, or particular treaties, the sentence will not be conclusive to falsify the warranty. This was determined in the following case.

(*a*) Sup. 250.—(*b*) Inf. 323.

A ſhip was *warranted Portugueze*; and, being taken by a *French* privateer, was condemned, *becauſe ſhe had an Engliſh ſupercargo on board.*—In an action on the policy, it appeared that the *French* government had lately made an ordinance, declaring all ſhips liable to capture, where the ſupercargo was the ſubject of a ſtate at war with *France.*—The plaintiff obtained a verdict, and upon a motion for a new trial, the court determined that the warranty was not falſified by this condemnation, and that the plaintiff was entitled to recover.—Lord *Mansfield* ſaid; —"This is an arbitrary and oppreſſive regulation, contrary to the law of nations. But as neither the inſured nor the underwriters knew any thing of it, neither of them was guilty of any fault. If the inſured had known of it, he might have taken care to conform to it: If the underwriters had known of it, they ought to have enquired who was to be ſupercargo. Both, however, being innocent, the underwriters, who take the riſk upon themſelves, ought to be liable for the loſs. It muſt be a fraudulent concealment to vitiate a policy. It is remarkable that neither party has ſaid any thing of the treaties between *France* and *Portugal.*"

A ſhip warranted *Portugueſe* is condemned by the *French* becauſe ſhe had an *Engliſh* ſupercargo on board, contrary to a *French* ordinance: This ordinance being contrary to the law of nations, the ſentence does not falſify the warranty.

Mayne v. *Walter*, B. R. Eaſt. 22 *G.* III. MS. S. C. *Park* 362.

This laſt obſervation ſhews that if the having an *Engliſh* ſupercargo on board had been contrary to any ſubſiſting treaty between *France* and *Portugal*, the condemnation would have been juſt, and the ſentence concluſive, to ſhew a forfeiture of the ſhip's neutrality. The following deciſion will ſerve to confirm this doctrine:

But if a ſhip be not navigated according to the ſubſiſting treaties between the country to which ſhe belongs, and the belligerent ſtate, ſhe will forfeit her neutrality.

A ſhip was inſured from *Liverpool* to *Amſterdam*, 'warranted *Dutch property*,' and was captured by the *French*, carried into *St. Maloes*, and there releaſed as being *Dutch* property; but upon appeal to the council of ſtate at *Paris*, ſhe was condemned as prize, by the name of *The Three Graces of Liverpool.*—In an action on the policy, it appeared that the ſhip had been originally a *French* privateer, called *L'Aimable Agathée*, which was taken by an *Engliſh* privateer and carried into *Liverpool*; and being condemned, ſhe there got the new name of *The Three*

A ſhip warranted *Dutch*, is condemned becauſe ſhe had not the neceſſary documents to prove her to be ſuch, according to the treaty of *Utrecht*, to which the *Dutch* were parties.—This falſifies the warranty.

Barzillay v. *Lewis*, B. R.

Trin. 22 G. III. MS. S. C. *Park* 358.

Graces. A merchant at *Liverpool* bought her for a houſe at *Amſterdam*, from whence a *Dutch* paſs or ſea brief was ſent for her, tranſlating her new name into *Dutch*, according to the treaty of *Utrecht*. She ſailed from *Liverpool*, under a *Dane*, who was her captain, and a crew conſiſting of 16, of whom five were *French*, who had been priſoners of war, and were returning home, four *Danes*, two *Swedes*, one *Dutch*, one *Portugueze*, one *Hamburgher*, one *Norwegian*, and one *Iriſh*. It appeared in evidence that by a *French* ordinance it was provided, 'That ſhips originally belonging to the enemy, and purchaſed by neutrals, are not conſidered as domiciled till they have been within ſome port of the neutral nation; and that a paſs ſhould be deemed fraudulent, unleſs the ſhip had been in the port from whence it had been obtained.' And, by another ordinance, two-thirds of the crew were required to be ſubjects of the neutral ſtate. Some of the crew ſwore they were hired by *Engliſhmen*, and that both ſhip and cargo were *Engliſh*; that when the ſhip, which took them, came in ſight, the captain ſailed back towards the *Engliſh* coaſt: But one of the crew having informed him that the ſhip in ſight carried *Engliſh* colours, he reſumed his courſe. The plaintiff was nonſuited on the ground that the decree of the court of appeal was deciſive to prove that the warranty was falſe.—Upon a motion for a new trial, the court concurred in that opinion, and that the policy was void.—Lord *Mansfield* ſaid,—"The warranty meant that the ſhip was *Dutch*, *to the purpoſe of being protected*; and the ſentence of the court of appeal in *France* is concluſive. The queſtion then is, what the ſentence means. The ſhip is condemned as not being *Dutch*. The warranty was, that ſhe was *Dutch*, which was falſe. The law of nations is founded in eternal principles of juſtice.—But in every war, the belligerent powers make particular regulations for themſelves, which being no part of, or, perhaps, repugnant to, the law of nations, do not bind other ſtates: But other ſtates, though not bound by them, muſt take notice of them for their own ſafety.

Neutrals ought, for their own ſafety, to take notice of the regulations made by the belligerent powers, even though repugnant to the law of nations.

In this caſe the inſured warranted this ſhip to be *Dutch*, and they knew they muſt conform to the marine regulations of *France*. The inſurers took the riſk upon this warranty; but when it is ſifted in the *French* courts, it turns out that ſhe has not the requiſites of a *Dutch* ſhip, her paſs not being agreeable to the treaty of *Utrecht*; and it ſhould appear to have been made on the oath of the captain. If the ſentence had gone on a ground collateral to the property, the plaintiff would have been permitted to go into evidence to ſhew the truth of the warranty; and ſo it was holden in *Mayne* v. *Walter* (*a*): But this condemnation went on the ground that ſhe was not completely documented, as a *Dutch* ſhip."

The two laſt caſes reconciled, and the reſult of both ſtated.

The doctrines contained in the two foregoing caſes ſeem, at firſt ſight, to be rather at variance: But a little attention will ſhew that there is a material difference between the circumſtances of the one and of the other. In the latter, ſuppoſing the ſhip to have been *Dutch* property, the owner, if not bound to know the regulations made in *France* on the ſubject of *Dutch* ſhips, ought at leaſt to have known what documents every *Dutch* ſhip was bound to have by the treaty of *Utrecht*, to which the ſtates of *Holland* were parties. And it muſt be taken as a rule, that the party warranting muſt be compleatly documented. Lord *Mansfield*, it is true, ſays that though other ſtates are not bound by the particular regulations made by belligerent powers, againſt the law of nations, yet *they muſt take notice of them*, for their own ſafety; and from this expreſſion it might be reaſonably inferred that he was of opinion that the non-obſervance of theſe regulations would amount to a forfeiture of neutrality. But he expreſsly ſays, that the ground of the condemnation in that caſe was, that the ſhip was not completely documented as a *Dutch* ſhip, according to the treaty of *Utrecht*. In the former caſe, there was no defect of documents: The only ground of the condemnation was the non-compliance with a *French* regulation, then lately made

(*a*) Sup. 323.

against the common rights of all nations. To this regulation the *Portugueze* were no parties; and the insured were not more likely to be informed of it than the underwriters.—The result, however, of Lord *Mansfield's* opinions delivered in both cases, seems to be, that when a belligerent makes particular marine regulations for its own benefit, affecting neutral states, but repugnant to the law of nations; there, though those neutral states are not obliged to observe them; yet, as it must be supposed that the power which made them, is determined, at all hazards, to enforce them, it is the duty of an insured, who warrants his ship or goods to be neutral property, if he has any knowledge of such regulations, to conform to them; in order to make himself a neutral '*to the* '*purpose of being protected*; or at least disclose to the underwriters his non-conformity.—And if the insurer, on the other hand, has any knowledge of these regulations, he ought to warn the insured of his danger, and inform himself whether the insured means to conform to them. But if neither has any knowledge of them, a condemnation of a foreign court of admiralty, founded on the breach of them, will not prove a forfeiture of the warranty.

If the insurer knows of such regulations, he shou'd apprise the insured of his danger.

But if both are ignorant of them, a foreign sentence of condemnation for not conforming to them, will not be conclusive to prove a forfeiture.

Some time after these decisions, a case (*a*) came before a very eminent and learned judge, at *nisi prius*, in which he ruled that a sentence of condemnation, by a foreign court of admiralty, was conclusive against the warranty, though founded on the mere want of a document required by an ordinance which was not binding upon any neutral state. But this decision has been since overruled, and the noble and learned judge has himself declared his disapprobation of it (*b*). As it cannot, therefore, be now considered as any authority, it is unnecessary to take any farther notice of it in this place.

In the following case, which has been lately decided upon great consideration, and upon a review of all the former authorities on this point, the line has been ably and accurately drawn between those sentences

(*a*) *De Souza* v. *Ewer*, *Park* 360.—(*b*) Vid. 8 T. R. 444, n.

of

of foreign courts of admiralty, which muſt be taken to be concluſive againſt the warranty, and thoſe which are not concluſive, but leave the queſtion of neutrality open for diſcuſſion in our courts.

An inſurance was made on goods on board the ſhip *Juliana*, "warranted a *Dane*," at and from *London* to *Teneriffe*.—In an action on this policy to recover for a loſs by capture, it appeared that the *Juliana was a* Daniſh *ſhip; the property of* Daniſh *ſubjects*; that ſhe ſailed from *Copenhagen* to *London* with a partial cargo, and there took on board a quantity of goods on account of the owners of the ſhip, and alſo the goods on which the inſurance was made; and, having taken out clearances for *Guernſey* and *Madeira*, ſhe ſailed on the voyage inſured, was captured by a *French* privateer, and carried into *Bourdeaux*: That during the voyage, and at the time of the capture, the *Juliana* had on board every document uſually carried by *Daniſh* ſhips: That *Eggleſton*, the maſter, was a native of *Scotland*, not naturalized in *Denmark*; but on the 6th of *October* 1794, poſterior to the war between *England* and *France*, he obtained letters of burgherſhip in *Denmark*, but had no domicil there: That the ſhip and cargo were condemned as prize by the tribunal of commerce of *Bourdeaux*; and this ſentence was confirmed upon appeal to the civil tribunal of *La Gironde*. In theſe two ſentences were recited ſeveral *French* ordinances, particularly one in 1778, by which it is declared that all ſhips ſhall be confiſcated, "wherever there ſhall be found on board a ſupercargo, merchant, commiſſary, or *chief officer*, being an enemy;" and it appeared that the ſhip was ultimately condemned for a violation of that ordinance, the captain being a *Scotchman*. Upon appeal to the ſupreme tribunal of caſſation at *Paris*, the former ſentences were confirmed, upon the ground that the maſter was born in *Scotland* and an enemy; and that, as his denization in a neutral country was not juſtified according to law, *his quality of enemy ſufficed to legitimate the prize*, and the court condemned him to pay a fine of 150 franks.—Upon this caſe, it was objected on the part of the defendant, that the ſhip was proved, by the

A ſhip warranted *Daniſh* is captured by the *French*, and condemned as prize, becauſe the captain was an 'enemy.'—This ſentence not being founded on the ground that the ſhip was not a *Daniſh* ſhip, but only becauſe ſhe had been navigated contrary to a *French* ordinance, does not falſify the warranty.

Pollard v. *Bell*, 8 T. R. 343.

ſentences of the *French* courts, not to be *Daniſh*, as ſhe was warranted to be.—But the court were unanimouſly of opinion that the warranty was not falſified by theſe ſentences, and that the plaintiffs were entitled to recover. —Lord *Kenyon* ſaid;—"It is true that the meaning of the warranty was not merely that the ſhip was *Daniſh* built, but that ſhe ſhould be circumſtanced during the voyage as a *Daniſh* ſhip ought to be. This is one of the numberleſs queſtions that have ariſen in conſequence of the extraordinary ſentences of condemnation paſſed by the courts of admiralty in *France* during this war, which have all proceeded on a ſyſtem of plunder. But ſtill, until the legiſlature interferes on this ſubject, we, ſitting in a court of law, are bound to give credit to the ſentences of courts of competent juriſdiction. If, therefore, in this inſtance, the *French* courts had condemned this ſhip, on the ground that ſhe was *Daniſh* property, we ſhould have been concluded by that ſentence in this action, and muſt, however reluctantly, have given judgment for the defendant. This is proved by the different authorities, and ſupported by reaſon. The courts of admiralty profeſs to proceed on the law of nations, and ſuch treaties as particular ſtates have agreed ſhall be ingrafted on that law. But I concur with Lord *Mansfield* in opinion, that it is not competent to any individual ſtate to add to the law of nations by its own arbitrary ordinances, without the concurrence of other ſtates (*a*). That is the ground on which this caſe muſt be decided. Now let us ſee what was the foundation of the condemnation in the *French* courts? It is ſtated in one of the ſentences, that by their own ordinances all ſhips are to be confiſcated "whenſoever on board theſe ſhips ſhall be found a ſupercargo, merchant, commiſſary, or chief officer, being an enemy." But I ſay that they had no right, by making ſuch an ordinance, to bind other nations. Then, was the ſhip in queſtion condemned on the ground that ſhe was not *Daniſh* property? Certainly not. It appears clear beyond all doubt that ſhe was at leaſt condemned on the

Though the ſentence of a foreign court of admiralty be founded on a ſyſtem of plunder, and manifeſt injuſtice, yet our courts of law are bound to give credit to their ſentences.

No individual ſtate can add to the law of nations by its own ordinances.

(*a*) Vid. *Bird* v. *Appleton*, 8 T. R. 562.

ground

ground that the captain was one of thoſe perſons whom by their own ordinances only they wiſhed to proſcribe. This caſe cannot be diſtinguiſhed from that of *Mayne* v. *Walter* (*a*), though, even without the authority of that caſe, I ſhould have had no heſitation in deciding in favour of the plaintiff. On the whole, therefore, I am of opinion, that though we ſhould have been concluded by that ſentence, if the ſhip, contrary to juſtice, had been condemned as not being *Daniſh*; yet, as the courts abroad have endeavoured to give other ſupports to their judgment, which do not warrant it, and have ſtated, as the foundation of the ſentence of condemnation, one of their own ordinances which is not binding on other nations, this ſentence does not prove that the ſhip in queſtion was not a neutral ſhip; and conſequently the plaintiff is entitled to recover.—Mr. Juſtice *Lawrence* ſaid—"There are two queſtions in this caſe; *firſt*, what is the ground of the ſentence of condemnation; *ſecondly*, whether it falſifies the warranty; for if it does, then, according to all the authorities, it is concluſive here.—On the firſt queſtion, the only ground of the ſentence was, that the captain of the ſhip was born in *Scotland* and an enemy; for they ſay, "that his quality of enemy ſufficed to legitimate the prize;" and this, merely becauſe it is againſt one of their own ordinances.—The next queſtion is, whether this has negatived the warranty. This warranty did not induce any neceſſity to comply with the peculiar regulations of the belligerent powers. For the general rule for judging and deciding whether a captured ſhip be neutral or not, is the law of nations, ſubject to ſuch alterations and modifications as may have been introduced by treaties: But where the law of nations has not been varied or departed from by mutual agreement, that is the general rule for deciding all queſtions on matters of prize. This is clearly laid down in the ſtate paper ſigned by Sir *George Lee*, Dr. *Paul*, the King's advocate, Sir *D. Ryder*, and Mr. *Murray*, then Attorney and Solicitor General,

The law of nations, ſubject to the alterations made by treaties, is the rule for deciding all queſtions of prize.

(*a*) Sup. 323.

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Ships ſhould be furniſhed with ſuch documents as the ſtates they belong to have by treaty agreed to be the evidence of their neutrality.

in anſwer to the *Pruſſian* memorials, concerning neutral ſhips (*a*): When, therefore, a ſtate in amity with a belligerent power has, *by treaty*, agreed that the ſhips of their ſubjects ſhall only have that character when furniſhed with certain preciſe documents, whoever warrants a ſhip to be the property of ſuch ſubject, ſhould provide himſelf with thoſe evidences which have, by the country to which ſhe belongs, been agreed to be the neceſſary proof of that character. In requiring this, no difficulty is impoſed, of which the inſured is not aware, and which may not be in his power to prevent: But to inſiſt on his furniſhing himſelf with every document the belligerent powers may require, and to inſiſt that the warranty is not complied with, unleſs the ſhip be navigated according to their ordinances and regulations, would be to deprive the inſured of his indemnity for the want of papers, &c. of the neceſſity of which he may fairly be preſumed ignorant, and which papers it may not perhaps be in his power to procure; for how can the officers of one country be called upon to grant that which the laws of that country do not require? Theſe *French* decrees are regulations made with ſome view to the laws of *France*, but are not applicable to the ſubjects of any other country. In examining the caſes decided on this point, it will be found to have been ſettled in many of them, that a condemnation on the particular ordinances of a belligerent power does not falſify a warranty of neutrality. In the caſe of *Bernardi* v. *Motteux* (*b*), the ſhip *Joanna* was warranted neutral; the only doubt was, whether ſhe had been condemned as being the property of an enemy, or for violating a *French arrêt*, by throwing papers overboard; for the one or the other of theſe cauſes ſhe was condemned. If ſhe had been condemned for the firſt, namely, that ſhe was not neutral, the plaintiff clearly could not have recovered, nor could he have recovered if ſhe had been condemned on the other ground,

But they are not bound to furniſh themſelves with every document the belligerent powers may arbitrarily require.

A condemnation on the particular ordinances of a belligerent power, does not falſify the warranty.

Bernardi v. *Motteux*, conſidered.

(*a*) Vid. Collectanea Juridica, 1 vol. 33.—(*b*) *Doug.* 375. ſup. 294.

according

according to the argument of the defendant in this caſe: But it is clear that the court did not, in that caſe, proceed upon the argument uſed for the defendant in the preſent caſe, becauſe the plaintiff did recover in that caſe, it not being certain that the ground of condemnation was, that the ſhip was the property of an enemy. But the caſe chiefly relied on by the defendant here is that of *Barzillay* v. *Lewis* (*a*), which was decided on the ground of a non-compliance with the treaty of *Utrecht*, and on the ſentence having condemned the ſhip as *Engliſh*. According to a manuſcript note of that caſe, taken by Mr. Juſtice *Buller*, rather more full than that in print, Lord *Mansfield* began his judgment by ſtating the ſentence of the court of admiralty as being concluſive, and that the queſtion was on the meaning of it. He afterwards obſerved, that the ſhip was inſured by her *Dutch* name, and that the underwriters took it for granted that ſhe was *Dutch*; but that, when this was ſifted in *France*, ſhe appeared to have none of the requiſites to ſhew that ſhe was neutral property, for ſhe had never been in a *Dutch* port, and the ſea brief was *not conformable to the treaty of Utrecht*; and he concluded by ſaying that the ſhip was condemned *as an Engliſh ſhip*, and that it was not open to this court to enquire whether that ſentence were right or wrong. So here if the ſhip had been condemned as an *Engliſh*, and not a *Daniſh* ſhip, we ſhould have been concluded by it. In that caſe Mr. Juſtice *Willes* and Mr. Juſtice *Aſhurſt* concurred; and Mr. Juſtice *Buller* ſaid, "The firſt ſentence ſeems to be on particular *arrêts*. The ſecond appears to go on the ground of property, for the name is changed, and they do not go into evidence as to the muſter-roll or ſituation of the crew as to their being more than two-thirds *Engliſh*. The other ground is more general, and makes it immaterial whether it was on the one ground or the other; *for if ſhe were not ſo documented* as to have the protection of a neutral ſhip, the warranty is not complied with.

Barzillay v. *Lewis* conſidered and illuſtrated.

(*a*) *Park* 410. ſup. 323.

It

It is true that Lord *Mansfield*, in the courſe of giving his opinion in that caſe, uſed ſome expreſſions which may be applied to ſupport the defendant's argument here; but it is clear that the ground on which he decided was a non-compliance with what was agreed by the treaty of *Utrecht* ſhould be a neceſſary document to prove the ſhip to be *Dutch* property; and this was the expreſs ground of the opinions of the other judges. That Lord *Mansfield* could not, in that caſe, intend to ſay that a non-compliance with the ordinances of *France*, not adopted by any treaty, was a forfeiture of neutrality, appears from the caſe of *Mayne* v. *Walter*, where the plaintiff recovered—He there pointedly ſhewed how ſuch ordinances might become binding, by obſerving that the *whole caſe turned upon the treaties between France and Portugal*, about which both parties were ſilent; and there it was holden that the circumſtance of having an *Engliſh* ſupercargo on board was no ground to defeat the plaintiff's right to recover on a policy on a ſhip warranted to be *Portugueſe*. In a ſubſequent caſe, *Saloucci* v. *Johnſon* (*a*), there were two grounds of condemnation, one that the ſhip would not ſtop to be ſearched, the other, that ſhe had not a charter party on board, as required by an ordinance of *Spain*. On the latter, Mr. J. *Aſhurſt* ſaid (according to my own note),—'As to the next queſtion, her not 'having a charter party: This clearly is not required by 'the law of nations; and it appears by the caſe that ſhe 'was a general ſhip. And though ſhe acted contrary 'to a particular ordinance of *Spain*, *other nations are not* '*bound to take notice of ſuch ordinance, unleſs in virtue of* '*ſome treaty ſubſiſting between two ſtates, by which they ſub-*'*mit to be bound by it.* That is not the caſe here.' So that the doctrine on which the caſe before us is determined was diſtinctly recognized there. The argument of the defendant here is, that the ſentence of condemnation is concluſive, on the point that the ſhip was not navigated according to the contract between the parties.

Mayne v. *Walter* conſidered.

Saloucci v. *Johnſon* conſidered.

(*a*) *Park* 415. ſup. 301.

—The

—The contract between the parties is, that ſhe was a neutral ſhip; but the ſentence has not decided that point; it has only decided that ſhe was not navigated according to an ordinance of *France*, but that was no part of the plaintiff's contract. In deciding this caſe in favour of the plaintiff, we do not take upon ourſelves to ſay that the ſentence of the *French* court of admiralty is erroneous: All that we determine is, that the *French* court has not decided that which would falſify the warranty of neutrality."

Courts of admiralty are to proceed on the *jus gentium*, which is not varied by particular treaties, except as between the parties to ſuch treaties.

In the caſe of *Bird* v. *Appleton*, which came before the court of King's Bench, ſoon after the above caſe, and which has been already fully ſtated (*a*), Lord *Kenyon* declared that he adhered to the opinion delivered by the court in the above caſe of *Pollard* v. *Bell*; and maintained, as an indiſputable propoſition, that courts of admiralty are to proceed on the known *jus gentium*, or on the treaties between particular ſtates; that ſuch treaties do not alter the *jus gentium* with reſpect to the reſt of the world; but, as between thoſe particular ſtates, they are conſidered as ingrafted on the *jus gentium*; and that one ſtate has no authority, by any ordinance of its own, to vary the general law of nations, as to other ſtates.

(*a*) Sup. 59. 173.

CHAP.

CHAP. IX.

Of Repreſentations.

The neceſſity of a ſtrict obſervance of good faith in matters of inſurance.

GOOD faith ſhould preſide in all the tranſactions of commerce, and in none more than in thoſe of inſurance, of which it is the vital principle. In this contract, each party is bound to conduct himſelf towards the other, not only with integrity, but with the moſt unreſerved openneſs and candour; and they ought mutually to diſcloſe to each other every circumſtance which can in any degree affect the riſk. It ſeldom happens that any ſuch circumſtance lies within the knowledge of the underwriter; fraud is therefore ſeldom imputable to him, and he is much oftener the victim of his own credulity. But the law watches, with a jealous eye, the conduct of the inſured, from whom the underwriter muſt, in moſt caſes, learn all the facts and circumſtances from which he makes his calculations, and appreciates the riſk. Every material repreſentation is conſidered as forming an ingredient in the contract, and every material miſrepreſentation or concealment is therefore deemed a fraud, and will avoid it. We will examine each of theſe important ſubjects in a ſeparate chapter, beginning with repreſentations. Under this head we will conſider,

1. What ſhall amount to a material repreſentation;

2. When a repreſentation ſhall be deemed ſufficiently true.

Sect. 1.

What ſhall amount to a material Repreſentation.

A REPRESENTATION, in inſurance, is underſtood to mean a collateral ſtatement, either by parol or in writing, of ſuch facts or circumſtances relative to the propoſed adventure, and not inſerted in the policy, as are neceſſary for the information of the inſurer, to enable him to form a juſt eſtimate of the riſk. Such repreſentations are often the principal inducement to the contract, and afford the beſt ground upon which the premium can be calculated.

Repreſentation in inſurance defined.

A repreſentation may be untrue, either wilfully and fraudulently; or, inadvertently and innocently.

A wilful miſrepreſentation or, *aligatio falſi*, in any fact or circumſtance *material to the riſk*, is a fraud that will always avoid the contract.—As if an agent, knowing that a ſhip had ſailed from *Jamaica* for *London* on the 24th of *November*, effect an inſurance on the voyage, and tell the underwriter that the ſhip ſailed in *December*: This is a fraud, and the policy is void (*a*).

A miſrepreſentation in a material point avoids the contract.

And ſuch miſrepreſentation ſo completely vitiates the policy, that the inſured cannot recover upon it, even for a loſs ariſing from a cauſe unconnected with the fact or circumſtance miſrepreſented. As if the inſured repreſent that the ſhip or goods inſured are neutral property, when in fact they are enemy's property; he ſhall not recover even for a loſs occaſioned by ſhipwreck.

And the inſured cannot recover on the policy even for a loſs ariſing from a cauſe unconnected with the fact miſrepreſented.

So it would be if the broker or agent were to aſſert that a ſhip or goods were neutral property, without knowing whether this were true or falſe, and they are, in fact enemy's property: For, though it may not, perhaps, be equally criminal *in foro conſcientiæ* for a man to aver that to be true which he knows nothing of, as to

So, if it be made without knowing whether it be true or falſe; or even if the perſon making it believe it to be true.

(*a*) Per *Lee*, C. J. at N. P. in *Roberts* v. *Fonnereau*, *Park*, 176.

aver

aver that to be true which he knows to be falſe; ſtill it is unqueſtionably a fraud, and in the caſe of an inſurance, equally injurious to the underwriter; becauſe he is induced by the deception, however occaſioned, to compute the riſk upon falſe principles. The ſame reaſoning holds even in the caſe where the perſon himſelf making the repreſentation *believes* it to be true.

But if he only give it as his *belief*, without knowing the contrary, it will not affect the contract.

But if he were only to ſay that he *believes* the ſhip to be neutral property, knowing nothing on the ſubject, and having no reaſon to believe the contrary; there, though the ſhip be not neutral, the repreſentation will not avoid the policy; becauſe the underwriter may inform himſelf of the grounds of this belief, before he enters into the contract; and if he neglect to do ſo, he takes upon himſelf the riſk of its being unfounded (*a*).

Neither does the word *expected* amount to a repreſentation.

Barber v. *Fletcher*, *Doug.* 292.

For the ſame reaſon, if the word *expected* be uſed, this will not amount to a repreſentation: As when a broker, in getting inſurances effected on ſeveral ſhips, belonging to the ſame owner, and ſpeaking of them all, ſaid,—'Which veſſels are *expected* to leave the coaſt of 'Africa in *November* or *December*, when, in fact, they had all ſailed in the *May* preceding: This does not amount to a repreſentation, being only an *expectation*, the ground of which the underwriter might have enquired into.

Difference between a repreſentation and a warranty.

There is a material difference between a repreſentation and a warranty. A warranty, being a condition upon

(*a*) This, in ſubſtance, is the doctrine of Lord *Mansfield* in the caſe of *Pawſon* v. *Watſon*, *Cowp.* 787; and though I would not preſume to queſtion ſo great and diſtinguiſhed an authority, yet I think it cannot be denied that there is, in this ſort of declaration of belief, where the party knows nothing on the ſubject, a want of fairneſs which approaches very near to fraud, and of which one would hope to ſee very few inſtances in commercial tranſactions. No honeſt man would declare even his *belief* of a fact, when this declaration may have the effect of benefiting himſelf at the expence of others, without reaſons for ſuch belief, amounting almoſt to moral certainty.

which

which the contract is to take effect, is always a part of the written policy, and must appear on the face of it (*a*): Whereas a representation is only matter of collateral information or intelligence on the subject of the voyage insured, and makes no part of the policy.—A warranty, being in nature of a condition precedent, must be *strictly and literally* complied with; but it is sufficient if a representation be true in *substance*.—By a warranty, whether material to the risk or not, the insured stakes his claim of indemnity upon the precise truth of it, if it be affirmative, or upon the exact performance of it, if executory; but it is sufficient if a representation be made without fraud, and be not false in any material point; or if it be *substantially*, though not *literally*, fulfilled. A false warranty avoids the policy, as being a breach of a condition upon which the contract is to take effect, and the insurer is not liable for any loss though it do not happen in consequence of the breach of the warranty. A false representation is no breach of the contract, but if material, avoids the policy on the ground of *fraud*, or at least because the insurer has been misled by it.

Written instructions, unless inserted in the policy, are only representations.

It has already been shewn that a warranty must appear upon the face of the policy, and make a part of the written contract; and therefore a written paper, wrapped up in the policy, or even wafered to it, is only a representation (*b*). For the same reason, the written instructions for effecting the policy, unless inserted in it, cannot be deemed a warranty, but only a representation (*c*); for the underwriter, by not insisting on having these instructions inserted in the policy, shews that he is content to take them as a representation.

Agents and brokers should keep entries of all such instructions, and of every representation.

But it behoves all agents and brokers concerned in the effecting of policies, to keep correct entries of these instructions, and indeed of all representations made to the underwriters: For the whole question between the in-

(*a*) Vid. sup. 251.—(*b*) Sup. 252.—(*c*) *R. Pawson v. Watson*, *Cowp.* 785, inf. 341.

They are reſponſible for the conſequences of any repreſentation made without authority.

ſured and the underwriters often turns upon theſe inſtructions. Beſides, they are anſwerable to the inſured for the conſequences of any repreſentation made by them without authority (*a*), as well as for thoſe of omitting to make ſuch repreſentations as they have been inſtructed to make.

A miſrepreſentation made to the firſt underwriter is a miſrepreſentation to all.

By an extenſion of equitable relief in caſes of fraud, it ſeems to be now ſettled that if a falſe repreſentation be made to the firſt underwriter on the policy, in a material point, this ſhall be conſidered as a miſpreſentation made to every underwriter, ſo as to infect the whole policy, otherwiſe it might be a contrivance to deceive many; for when a reſpectable underwriter ſtands firſt on the policy, the reſt ſubſcribe the policy without aſking a queſtion; and if the firſt underwriter be impoſed upon, the reſt are entrapped by the ſame fraud (*b*).

But this objection muſt be made at the trial, in the firſt inſtance: It will be too late afterwards.

But the inſurer muſt avail himſelf of this ſort of objection in the firſt inſtance; for after a verdict has been obtained, the court will not ſet it aſide upon an affidavit of the firſt underwriter, that a material miſrepreſentation had been made to him. The defendant, in ſuch caſe, knows what has been repreſented to himſelf, and might have known what had been repreſented to the firſt underwriter; and he ſhall not lie by till after a trial, in order to make the objection, if the verdict ſhould be againſt him (*c*).

If the inſured ſtate his computation as *fact*, and it prove untrue, it will avoid the policy.

If the inſured ſtate his computation as *fact*, inſtead of the information on which he founds his computation, and it prove untrue, it is a miſrepreſentation; and if material, it will avoid the policy.

A ſhip inſured on the 30th of *January*, from *New York* to *Philadelphia*, is repreſented to have been ſafe in the *Delaware* on the 11th of *December*, when

As where an inſurance was made in *London*, on the 30th of *January*, on a ſhip from *New York* to *Philadelphia*; and the broker then repreſented the ſhip to be, "A tight veſſel, had ſailed with ſeveral armed ſhips, and "was ſeen ſafe in the *Delaware, on the 11th of December*, "by a ſhip which arrived at *New York*."—In fact, the ſhip

(*a*) Per Lord *Mansfield*, in *Pawſon* v. *Watſon*, *Cowp.* 787. —(*b*) Per Lord *Mansfield*, in *Pawſon* v. *Watſon*, *Cowp.* 786. Vid. ſup. 39.—(*c*) R. *Barker* v. *Fletcher*, *Doug.* 292.

was

was loſt on the 9th of *December*, by running againſt a *cheveux de friſe* placed acroſs that river. There was no evidence nor any imputation of actual fraud, on the one hand, nor any proof *when* the ſhip was ſeen in the *Delaware*, on the other.—Upon the trial of the cauſe, there was a verdict for the defendant.—The plaintiff moved for a new trial, inſiſting, that the meaning of the repreſentation was, that the ſhip had got through two thirds of her voyage from *New York*, and beyond the reach of capture. To this it was anſwered, that the queſtion of the materiality of the fact miſrepreſented was before the jury, who had determined that it was material.—The court held that the repreſentation concerning the day being thus found to be material, and being alſo found untrue, the inſured was not entitled to recover. Lord *Mansfield* ſaid;—"A repreſentation muſt be fair and true, as to all that the inſured knows: And if he repreſent facts without knowing the truth, he takes the riſk upon himſelf. This caſe is very different from *Pawſon* v. *Watſon* (*a*), where the ſhip was only fitting out when the inſurance was made. It was then only ſaid what was *meant* to be done; and what *was done* was more advantageous than what had been repreſented. Though there was no evidence of actual fraud in this caſe; yet the underwriter was deceived as to the fact, and entered into the contract under that deception. The inſured ought not to have taken upon himſelf to *compute* the day of the month on which the ſhip had been ſeen in the *Delaware*. It was his duty to ſtate exactly his information, and leave the underwriter to make the computation. In inſurances on ſhips at a great diſtance, their being ſafe up to a certain day is always conſidered as a very important circumſtance."

when in fact ſhe was loſt on the 9th of *December*.—This repreſentation being the reſult of the inſured's *computation*, and though not fraudulent, avoided the policy.

Macdowall v. *Fraſer* *Doug.* 247.

A miſrepreſentation in a material point equally vitiates the contract, whether it be the miſrepreſentation of the inſured himſelf or of his agent, and whether it proceed from fraud, miſtake, or negligence; for the inſurer is

A miſrepreſentation, whether by the inſured or his agent, and whether fraudulent or innocent, avoids the contract.

(*a*) Inf. 341.

thereby led into an error, and computes the riſk upon falſe grounds.

A letter, ordering an inſurance to be effected, was written by the agent of the inſured before, and ſent after, a loſs was known: This is a miſrepreſentation, whether it aroſe from fraud or negligence.

Fitzherbert v. *Mather*, 1. T. R. 12.

Thus:—A policy on a cargo of oats was effected on the 21ſt of *September*, "At and from *Hartland* to *Portſmouth*, loſt or not loſt, beginning the adventure from the loading at *Hartland*."—The oats were ſhipped by *R. Thomas*, a cornfactor at *Hartland*, *on the 16th of September*, and the ſhip was loſt the ſame day off *Hartland* pier. On the ſame day *Thomas* wrote to the plaintiff's agent at *Portſmouth*, and informed him that he had *that morning* ſhipped the oats, and the ſhip ſailed immediately, but he was afraid the wind was coming to the weſtward, and would force her back.—He alſo wrote, on the ſame day, to *Fiſher*, the plaintiffs agent in *London*, to the ſame effect, in order that he might inſure, adding theſe words, "I wiſh the whole ſafe to hand. This evening appears ſtormy."—About ſix or ſeven o'clock the ſame evening *Thomas* heard that the ſhip *was on ſhore*, and at ſix o'clock the next morning (the 17th of *September*) he knew ſhe *was loſt*. The 16th was not a poſt day at *Hartland*, and the letters did not go from thence till noon on the 17th, and were received in *London* on the 20th.—*Fiſher*, having been previouſly directed by the plaintiff to inſure this cargo as ſoon as the bills ſhould be ſent him, he directed the inſurance to be effected, which was done on the 21ſt.—Upon this caſe the court gave judgment for the defendant."—Lord *Mansfield* ſaid;—"This policy was effected by miſrepreſention, ariſing from the plaintiff's agent, who gave the intelligence. Now, whether this happened by fraud or negligence, it makes no difference; for in either caſe the policy is void. The underwriter was warranted, on the information of the agent, to take for granted that the ſhip was ſafe at noon on the 17th; and this information was purpoſely given by *Thomas* to *Fiſher*, that he might inſure. And though the letter might have been *written* before *Thomas* heard that the ſhip was on ſhore, yet he knew ſhe was abſolutely loſt before he *ſent* it; and he had full opportunity to ſend an account of the loſs. If *Thomas* was not guilty of fraud, at leaſt he was guilty of great negligence; and either way,

way, or even if *Thomas* was quite innocent, the policy was void." Mr. Juſtice *Buller* ſaid;—"Though the plaintiff were innocent, yet, if he take his information from that of his agent, and his agent be guilty of a miſrepreſentation, the principal muſt ſuffer; and where one of two innocent perſons muſt ſuffer by the fraud or negligence of a third, the loſs ſhall fall on him who gave him credit."

Sect. 2.

When a Repreſentation ſhall be deemed ſufficiently true.

But it is ſufficient if a repreſentation be true in ſubſtance.

BUT a repreſentation, being only matter of collateral information, it is ſufficient if it be true *in ſubſtance*, and its not being inſerted in the policy in the form of a warranty, is looked upon as a proof that the inſurer does not require it to be ſtrictly and literally true.

A repreſentation was "12 guns and "20 men;" and the ſhip ſailed with 10 carriage guns, 6 ſwivels, 16 men, and 11 boys:—This being a greater force than the repreſentation ſtated, the repreſentation is true in ſubſtance.

Pawſon v. *Watſon*, *Cowp.* 785.

Thus:—The *firſt* underwriter on a policy had this inſtruction ſhewn to him;—"3500 l. upon the ſhip *Julius* "*Cæſar* for *Halifax*, to touch at *Plymouth*, and any port "in *America*. She mounts 12 guns and 20 men."—To the preſent defendant and the other underwriters, ſhe was repreſented generally, as *a ſhip of force*. The inſtructions were dated the 28th of *June*, 1776, and the ſhip ſailed the 23d of *July* following. But at the time the policy was effected, there were neither men nor guns on board. The ſhip was captured; and, at the time ſhe was taken, ſhe had on board 10 carriage guns, 6 ſwivels, 16 men and 11 boys, which were more than equivalent to 12 carriage guns and 20 men, in point of ſtrength and convenience, and for the purpoſe of reſiſtance; and it was proved, that in merchant ſhips, boys always go under the denomination of men.—It was objected, however, that guns meant *carriage* guns, not ſwivels; and that men meant *able ſeamen*, excluſive of boys.—But the court was of opinion, that had this repreſentation of the ſhip's force been a *warranty*, the defence muſt have prevailed;

becauſe, though there were more than 20 men in the underſtanding of commercial men, yet there were not in fact 12 carriage guns: But this being a *repreſentation* and not a warranty, and the ſhip having a greater force than if ſhe had had 12 carriage guns; there was no fraud, the repreſentation being true in ſubſtance (*a*).

Though the voyage be repreſented as being leſs than the voyage deſcribed in the policy, yet, if there be no fraud, and the voyage performed be within the policy, it will be protected.

If a repreſentation ſhew that a leſs voyage is intended than that which is deſcribed in the policy, yet, if there be no fraud, and the voyage actually performed be within the policy, though greater than that mentioned in the repreſentation, it will be protected by the policy.

The voyage in a policy is deſcribed to be from *L'Orient* to the *Iſles of France* and *Bourbon*, *China*, *Perſia*, and during the ſhip's ſtay and trade, &c. A repreſentation deſcribes the voyage to be to *Madeira*, the *Iſles of France*, *Pondicherry*, *China*, and back by the *Iſles of France* to *L'Orient*:—Though the voyage deſcribed in the repreſentation be leſs than that mentioned in the policy, yet, being without fraud, and the voyage performed being within the policy, it is protected by the policy.

As where an inſurance was made, "At and from "*Port L'Orient* to the Iſles of *France* and *Bourbon*, to all "or any ports or places whatſoever in the *Eaſt Indies*, "*China*, *Perſia*, or elſewhere beyond the *Cape of Good* "*Hope*, from place to place; and during the ſhip's ſtay and "trade, backwards and forwards, at all ports and places, "and until her ſafe arrival back at her laſt port of diſ-"charge in *France*.'—In an action on this policy, it appeared on the trial, that when the policy was ſubſcribed, there was a ſlip of paper wafered to it, and ſhewn to the underwriters, on which was written the following repreſentation: "The ſhip has had a complete "repair, and is now a fine and good veſſel, three decks. "Intends to ſail in *September* or *October* next; is to "go to *Madeira*, the *Iſles of France*, *Pondicherry*, *China*, "the *Iſles of France*, and *L'Orient*."—The ſhip ſailed on the 6th of *December* 1776; arrived at *Pondicherry* the 23d of *July* 1777; continued there till the 23d of *Auguſt*; when, inſtead of proceeding to *China*, ſhe ſailed for *Bengal*, where ſhe paſſed the winter; and, having there undergone conſiderable repairs, returned to *Pondicherry* early in 1778; from whence, having taken in her homeward cargo, ſhe ſailed for *L'Orient*; but was captured

Bize v. Fletcher, at N. P. Dauſ. 471.

(*a*) This ſeemed to be the opinion of Lord *Mansfield*, and the court; though the principal ground of the judgment was, that almoſt all the underwriters conſidered the ſhip to be a ſhip without force, and the premium ſuited to ſuch a riſk.

on that voyage in *October* in that year. It appeared that ſhe ſpent much more time than is uſual, in her voyages to and from *Bengal*, having touched and ſtayed at ſeveral places both in going and returning; and that the difference of inſurance is one *per cent.* going to *Bengal* and not to *China*.—It was contended on the part of the defendant, that the repreſentations reſtrained the voyage inſured to the limits therein ſpecified; and ſome letters were read, which, it was ſaid, raiſed a preſumption that the neceſſity of going to *Bengal* was merely a pretence deviſed after the capture.—Lord *Mansfield* told the jury in ſubſtance, "That the firſt queſtion was, whether the policy was void on account of miſrepreſentation, which muſt be fraudulent, that is, *falſe* in a *material* inſtance, in reſpect to the riſk *run*. That the repreſentation meant to ſay; "I will have this underſtood as my preſent intention; "but I will have it in my power to vary it." That fraud is found out by the materiality of the point it is charged in; and if they thought that this was a wilful miſrepreſentation to avoid paying the one *per cent.* the defendant would be entitled to a verdict: But if no fraud was intended, and the real intention, at the time of the repreſentation, was to go to *China*, the plaintiff would be entitled to a verdict; for the inſured might change his intention and go to *Bengal*, that voyage being clearly protected by the policy, which, being expreſſed in more comprehenſive terms, gave a greater latitude than the repreſentation."—The jury accordingly found for the plaintiff (*a*).

Even if a repreſentation as to the courſe of the voyage, be literally untrue, yet if it be made in conformity to an eſtabliſhed uſage of trade, and no perſon be deceived by it, and the voyage meant to be performed be within the policy, it will not avoid the contract.

Even if a repreſentation be untrue, it will not avoid the policy, if the inſurer be not deceived by it.

Thus:—An inſurance was made on goods on board a *Swediſh* ſhip, "At and from *London* and *Ramſgate* to *Nantz*,

A ſhip inſured from *London* to *Nantz*, with liberty to touch at *Oſtend*, clears out for *Oſtend* only, but means to go direct to *Nantz*, with

(*a*) Some part of this ſumming up is taken from Mr. *Park's* note of this caſe, which differs materially from *Douglas*.

bills of lading, purporting to be made out at *Oſtend*, as if the goods had been ſhipped there, in order to be able to import *Engliſh* goods into *Nantz* at *Oſtend* duties, and alſo to ſave the light-houſe duties going down the *Channel*.—This being a conſtant practice, and known to all concerned in this trade, is no fraud on the underwriters.—Nor will the intention to evade the light-houſe duties render the contract ill gal.—The policy being effected before, and the ſhip having ſail'd after, a war broke out, does not affect the contract.

Planché v. *Fletcher*, *Doug.* 238.

"with liberty to call at *Oſtend*; being a general ſhip in "the port of *London* for *Nantz*."—There was a declaration in the policy, that the inſurance was made on account of certain perſons, who, from their names, ſeemed to be *French* ſubjects.—The ſhip's clearances, and other papers from the cuſtom-houſe in *London*, were made out for *Oſtend* only, but the goods were ſhipped for *Nantz*, and the ſhip was intended to go directly to that place, without going to *Oſtend*. Bills of lading in *French*, dated the 18th of *July* 1778, were ſigned by the captain in *London*, but purporting to be made at *Oſtend*, and that the goods were ſhipped there, to be delivered at *Nantz*. The policy was ſubſcribed by the defendant the 7th of *July*, and the lading was taken in between the 24th of *July* and the 17th of *Auguſt*. The proclamation for making repriſals on *French* ſhips was publiſhed on the 31ſt of *July*. Two underwriters ſigned the policy after the proclamation at the ſame premium given before. The captain, as ſoon as he ſailed, deſtroyed the papers he had from the cuſtom-houſe in *London*. The ſhip ſailed on the 24th of *Auguſt*, and was taken by the *Engliſh*, and the goods condemned as *French* property.—In an action upon this policy, one objection made by the defendant was, that the ſhip had been cleared out for *Oſtend*, though ſhe was never deſigned for that place, which was a fraud on the underwriters.—That the fabrication of falſe and colourable papers, and the ſuppreſſion of the true deſtination of the ſhip, were circumſtances of fraud, tending to miſlead the underwriter, as to the voyage intended to be inſured, and the nature of the riſk.—To meet this objection, it was proved to be the conſtant practice, well underſtood by all perſons concerned in this branch of commerce, that all ſhips, going with goods of *Britiſh* manufacture to *France*, clear out for *Oſtend*, though they do not mean to go thither. The reaſons for this were, that the light-houſe duties are ſaved; which are payable when the voyage is known to be directly down the channel; and that the *French* duties are leſs upon goods from *Oſtend* than from *England*. A ſecond objection was, that, as hoſtilities were declared, after the policy was ſigned, and before the ſhip ſailed, the defendant ought

to

to have had notice, that he might have exerciſed his diſcretion, whether he would chuſe, for a peace premium, to run the riſk of a capture; and it was the duty of the inſured to give the underwriter information that the ſhip continued in the river after the proclamation. It was alſo contended, that in time of war, the exportation of enemy's property in neutral bottoms was illegal, and that an inſurance on ſuch goods was void.—The plaintiff had a verdict; and, on a motion for a new trial, the court were clearly of opinion that he was intitled to recover.—Lord *Mansfield* ſaid;—" This verdict is impeached upon two grounds; *Firſt*, that there was a fraud on the underwriters in clearing out the ſhip for *Oſtend*, when ſhe was never intended to go thither. But I think there was no fraud on them, perhaps not on any body. What was practiſed in this caſe was proved to be the conſtant courſe of trade, and notoriouſly ſo to every body. The reaſon for clearing for *Oſtend*, and ſigning bills of lading, as from thence did not fully appear. But it was gueſſed at. The farmers of the revenue in *France* connive at the importation of *Engliſh* goods, and take *Oſtend* duties, rather than exact a tax which amounts to a prohibition. But at any rate, this was no fraud in this country. With regard to the evaſion of the light-houſe duties, the ſhip was not liable to confiſcation on that account (*a*). The ſecond objection is, that the po-

(*a*) Though the ſhip might not have been liable to *confiſcation* for evading the light-houſe duties, yet, as one motive for clearing out for *Oſtend* was to commit a fraud againſt the laws of this country, this ſeems to be within the reaſon of the caſes in which the policy has been holden to be void where the voyage has been undertaken for illegal purpoſes. Vid. ch. 3, § 1. & 2. & ch. 5.—According to the foreign writers, a deviation is excuſeable, if it be to avoid a toll eſtabliſhed contrary to the law of nations: *Nauta excuſatur ſi hoc faceret cauſâ conſervandi jus ſuum, quia vectigal erit illicitum. Straccha* de navib. p. 3, n. 8. But if the captain deviate to avoid a toll or duty lawfully authorized, this will diſcharge the inſurers. *Si, pour éviter un péage légitime et autoriſé, le capitaine s'écartoit de la voie ordinaire, il ſeroit en faute; par conſequent, les aſſureurs ſeroient déchargés des riſques.* *Emerig.* tom. 2, p. 60.

licy was made before, and the ſhip ſailed after, the proclamation for repriſals. But a war was at that time expected by every man in both countries; the ambaſſadors of both were recalled; the fleets at ſea, waiting for each other to fight; and the *Pallas* and *Licorne* taken from the enemy. It is indifferent whether the goods were *French* or *Engliſh*: The riſk inſured extends to all captures; and as the ſame premium was accepted after the proclamation, that was paid before, it appears that the war-riſk was in view when the defendant ſigned.—Shall he avail himſelf of an event which increaſes the riſk, but which he had in contemplation when he underwrote the policy?"

If it be ſtated that a ſhip was *ready to ſail* on a certain day, when in fact ſhe had ſailed, this is a miſrepreſentation.

Every repreſentation reſpecting the ſtate of the ſhip, and the time of her ſailing, is material; and therefore if it be ſtated that a ſhip was *ready to ſail* on a certain day, when in fact ſhe had ſailed the day before, this is both a miſrepreſentation and a concealment, and will avoid the policy (*a*).

(*a*) Per Lord *Mansfield* in *Fillis* v. *Brutton*, at N. P. *Park* 182, inf. 348.

CHAP. X.

Of Concealment.

CONCEALMENT, or *suppreſſio veri*, is nearly allied to miſrepreſentation, or *allegatio falſi*, and conſiſts in the fraudulent ſuppreſſion of any fact or circumſtance material to the riſk. *Dolus malus non tantum in eo eſt, qui fallendi cauſâ obſcurè loquitur; ſed etiam qui inſidioſè obſcurè diſſimulat* (*a*). This, like every other fraud, avoids the contract *ab initio*, upon principles of natural juſtice. For, as the facts upon which the riſk muſt be eſtimated generally lie within the knowledge of the inſured, or of his agents, the underwriter muſt, in moſt caſes, rely on him for all the neceſſary information to enable him to decide, upon what terms he will take upon himſelf the propoſed riſk; and he computes the premium, and enters into the contract, in the confidence that the inſured, being fully informed of all circumſtances relating to the intended voyage, has dealt fairly with him, and has kept back nothing which it might be material for him to know.

A fraudulent concealment avoids the contract.

But it is not merely on the ground of *fraud* that a concealment avoids the contract: Even a concealment which is only the effect of accident, negligence, inadvertence, or miſtake, will be equally fatal to the contract, as if it were intentional and fraudulent (*b*). Nor can the inſured, by tendering any increaſe of premium, require the inſurer to confirm it; for the inſurer has a right to ſay that he would not have ſubſcribed the policy, upon any terms, if if he had not been deceived (*c*).

Even an innocent concealment, if material, will avoid the policy.

(*a*) ff. l. 43, § 2, de dolo malo.—(*b*) Per Lord *Mansfield*, in *Carter* v. *Boehm*, 1 *Bl.* 594, 3 *Bur.* 1909, and in *Ratcliffe* v. *Shoolbred*, inf. 349.—(*c*) Vid. *Emerig.* tom. 1, p. 20.

The insured should therefore disclose all material circumstances.

It therefore behoves the insured, from motives of common prudence, to inform himself of every fact and circumstance which may throw the smallest light on the nature and perils of the proposed adventure; and he is bound by principles of moral honesty to disclose to the insurer all such circumstances with the most unreserved candour and frankness.

In this chapter we will consider,

1. What shall be deemed a material concealment;
2. What things need not be disclosed.

Sect. 1.

What shall be deemed a material Concealment.

Whatever respects the state of the ship, the time of sailing, &c. should be disclosed.

EVERY fact and circumstance which can possibly influence the mind of the insurer in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material. Therefore, whatever respects the state of the ship, the time of her sailing, the nature of the employ in which she is to be engaged, &c. ought to be fully and explicitly disclosed; and the keeping back any fact of this sort, will be fatal to the contract. And, in such case, the concealment so vitiates the policy that it will afford the insured no remedy, even for a loss arising from a cause unconnected with the fact or circumstance concealed; for a concealment is to be considered, not with reference to the event, but to its effect, *at the time of making the contract* (*a*).

The broker's instructions state that the ship was ready to sail on the 24th of *December*, when in fact she had sailed on the 23d: This is a material concealment and misrepresentation.

As where an insurance was made on a ship from *Plymouth* to *Bristol*, and it appeared that the broker's instructions stated that the ship was ready to sail on the 24th of *December*, when, in fact, she had sailed on the 23d.—Lord *Mansfield* ruled that this was a material concealment and misrepresentation: He said;—"In all insurances it is essential to the contract, that the insured should represent the true state of the ship, to the best of his knowledge.

Fillie v. *Bruston*, at N. P. *Park*, 182.

(*a*) Vid. *Seaman* v. *Fonnereau*, 2 *Str.* 1183, inf. 352.

On

On that information the underwriters engage. If he ſtate that as a *fact*, which he does not know to be true, but only believes it, this is a miſrepreſentation. He is bound to tell the underwriters truth. The material point in this caſe, therefore, is, had the ſhip ſailed or was ſhe in port?" The jury, upon this direction found for the defendant.

So, where an inſurance was made on a ſhip, "At and "from the coaſt of *Africa*, to her laſt diſcharging port "in the *Weſt Indies*."—She failed from the coaſt of *Africa*, on the 2d of *October*, and was captured on the 6th of *December*.—On the 22d of *February*, the owner received information that ſhe was well, and had ſailed from *Africa* on the 2d of *October*; and on the ſame evening wrote to a broker to get an inſurance made on her, adding theſe words;—"As ſhe is *rather long*, and we do not think it "prudent to run ſo large a riſk at ſo critical at a time. "We expect to hear of her ſoon."—Fearing, however, that if ſome intimation were not given of the information they had received, this might affect the policy, they ordered the broker to add to his inſtructions, "*The above ſhip was on the coaſt the 2d of October*," but ſaid nothing of her having *ſailed* on that day.—On the trial, it was objected, that there had been a material concealment of the true ſtate of the ſhip.—Lord *Mansfield* told the jury that the inſured were bound to repreſent to the underwriters all the material circumſtances relative to the ſhip and the voyage. That if he did not, though the omiſſion were by accident or negligence, the underwriters were not liable. *A fortiori*, if he ſuppreſſed or miſrepreſented from *fraud*: That the plaintiffs in this caſe, having concealed a material part of the information they received, it was a fraud, and the inſurers were not liable.—The jury under this direction, found for the defendant.

The inſured, knowing that his ſhip had *ſailed* from the coaſt of *Africa* on a certain day, only ſtates that ſhe was *on the coaſt*, on that day. This is a material concealment.

Ratcliffe v. *Shoolbred*, at N. P. MS. *Park*, 181.

The following caſe, though upon a mere queſtion of fact, will ſhew to what length the courts will go upon a well-grounded ſuſpicion of fraudulent concealment.

A well-founded ſuſpicion of a concealment will amount to proof of fraud.

One

An intimate friend of the owner of a ſhip hearing of her being loſt, informs his clerk of the misfortune; and he, the ſame day, by order of the owner, writes to have an inſurance effected on the ſhip:—The concealment by the clerk avoided the policy, even ſuppoſing the owner himſelf quite innocent.

Stewart v. *Dunlop*, in Dom. Proc. April 18th, 1785. *Park*, 209.

One *Boog* at *Greenock*, a friend of the owner of the ſhip *Peggy*, and partner with him in ſome other adventures, was informed by a perſon juſt arrived at *Greenock*, that the *Peggy* was taken. *Boog deſired it might be concealed*, and the ſame day had a converſation with the owner's clerk; but the clerk, in his evidence, depoſed, that at no part of that day had he any converſation with, or information from *Boog*, relative to the *Peggy*, *nor any hint* from him or any other perſon relative to the making of any inſurance upon her, further than *Boog's* aſking him, '*if* '*he knew whether there was any inſurance made upon her.*' Afterwards the clerk, by the deſire of the owner, wrote to get an inſurance effected, which he did without ſtating a word to his maſter of the converſation with *Boog*.—Upon this caſe, though it did not appear that the owner knew of the loſs at the time he ordered his clerk to write, yet it was decreed by the Lords of Seſſion in *Scotland*, and their decree afterwards affirmed in the Houſe of Lords, that the inſurance would not have been made, if the intelligence of the capture of the *Peggy* had not arrived at *Greenock* the preceding day; and that therefore the policy was void.

The reaſon of this deciſion ſeems to be, that though no knowledge of the loſs, at the time of making the inſurance, was brought home to the owner himſelf, yet what paſſed between the clerk and *Boog* muſt have been deemed ſufficient proof that he knew of the loſs at the time he wrote the letter; and his concealment of that was ſufficient to avoid the policy.

Concealment of the time of the ſhip's ſailing avoids the policy.

Mc Andrews v. *Bell*, Eſp. Rep. 373.

So where the plaintiff received on the 24th of *November* a letter from *Liſbon*, dated the 8th of the ſame month, that the ſhip *was ready to ſail*, but did not make the inſurance on the receipt of the letter, nor till the 2d of *December*, after the arrival of another ſhip which ſailed at the ſame time with the ſhip inſured, and did not then communicate the contents of the letter to the underwriters.—Lord *Kenyon* held this to be a concealment which avoided the policy. (*a*).

(*a*) Vid. *Webſter* v. *Foſter*, Eſp. Rep. 407, and *Chaurand* v. *Angerſtein*, *Peake*, 43.

It

It is in ſome caſes neceſſary to ſtate to the underwriters the nature of the ſervice in which the ſhip is to be employed. If this be attended with any extraordinary danger, the concealment of it will avoid the policy.

If a ſhip is to be employed in a ſervice of peculiar danger, this ſhould be ſtated to the inſurers.

Emerigon (*a*) reports the following deciſion to prove this propoſition.—A ſhip was chartered by the commiſſaries of the *French* army, and the owner cauſed her to be inſured, without mentioning the nature of the ſervice ſhe was to be employed in, which was very likely to be attended with extraordinary riſk: In fact the commiſſaries were under the orders of the commanding officer, in the execution of which the ſhip was loſt. It was decreed in the Parliament of *Aix* that the inſurers were not anſwerable.

It is adviſeable for the broker or agent to diſcloſe all he knows reſpecting the propoſed adventure, and not to preſume to exerciſe his own judgment upon the materiality of any part of it; for if, in repreſenting the ſtate of the ſhip, and the laſt intelligence concerning her, he do not diſcloſe the *whole*, and what he conceals ſhall appear to be *material*, the contract will be void, though the concealment be without any intention of fraud, but merely becauſe *he thought* the matters concealed *immaterial* (*b*).

A material concealment is fatal, though the fact concealed was not diſcloſed, becauſe the broker thought it immaterial.

Even doubtful rumours reſpecting the ſafety of a ſhip which is meant to be inſured *loſt or not loſt*, how little credit ſoever the owner himſelf may give them, ought to be faithfully diſcloſed to every underwriter; and the withholding ſuch information will avoid the contract.

Even doubtful rumours reſpecting the ſafety of the ſhip ought to be diſcloſed.

As where a man, having a doubtful account that a ſhip, like one belonging to himſelf, had been captured, cauſed his ſhip to be inſured, without giving any notice to the underwriters of what he had heard.—In this caſe it was determined that the inſurance was void; for though the inſured had no certain intelligence that his ſhip was taken; yet, if he had fairly diſcloſed what he had heard, it muſt be ſuppoſed that the underwriters would at leaſt have inſiſted on a higher premium, if they would have inſured at all.

Da Coſta v. *Scandret*, 2 P. W. 170.

(*a*) Tom. 1, p. 172.—(*b*) Per Cur. in *Shirley* v. *Wilkinſon*, *Doug.* 306.

So,

The owner of a ship having received uncertain intelligence of her being lost in a storm, gets her insured, without disclosing this information:—The insurance is void, and though the ship is well after the storm, yet the insurer shall not be answerable for a subsequent capture.

Seaman v. Fonnereau, at N. P. 2 *Str.* 1183.

So, where an insurance was made on the ship *Davy* on the 25th of *August*, and it appeared that the agent for the insured had received a letter from *Cowes* two days before, dated the 21st of *August*, wherein the writer informed him 'that he had been in company with the '*Davy* on the 12th, and at midnight lost sight of her 'all at once; that she was leaky the day before, and the 'next day there was a hard gale.'—The ship however continued on her voyage till the 19th, when she was taken.—Though there was no pretence of any knowledge of the actual loss at the time of the insurance, which was made in consequence of a letter, received the 25th of *August*, from the owner abroad, dated the 27th of *June*; yet it was holden by Lord C. J. *Lee*, that this was a concealment which avoided the policy; and that it was not material that the loss was not such as the letter imported; for a concealment is to be considered with reference to its effect *at the time of the contract*, and not to be judged of by subsequent events. He therefore thought this a strong case for the defendant, and the jury found accordingly.

The non-compliance with an ordinance, though it be contrary to the law of nations, ought to be disclosed.

In the case of *Mayne* v. *Walter*, which we have already noticed *(a)*, it appears that by a *French* ordinance, all ships were declared liable to capture, whereof the supercargo should be the subject of a state at war with *France*; and it seems to have been the opinion of Lord *Mansfield*, that though this ordinance was contrary to the law of nations, yet, that if a neutral insured knew of such an ordinance, and had not complied with it, he was bound to disclose this circumstance to the underwriters, and the withholding it would have been a fatal concealment.

A concealment by an underwriter will avoid the policy, as to him.

The obligation of a strict observance of good faith, is equally binding on both parties in all contracts; and in that of insurance, the underwriter, as well as the insured, is bound to disclose all circumstances within his knowledge affecting the risk. If, therefore, it appear that, at the time he underwrote the policy, he knew that the ship was arrived safe, the contract will be void as to him,

(*a*) Sup. 323.

and

and an action will lie againſt him to recover back the premium (*a*).

Sect. 2.

What things need not be diſcloſed.

BUT either party may be innocently ſilent as to many matters which are open to both, and upon which they may both exerciſe their judgments. '*Aliud eſt celare, aliud tacere: Neque enim id eſt celare quicquid reticeas; ſed eum quod tu ſcias, id ignorare, emolumenti tui cauſâ, velis eos, quorum interſit, id ſcire* (*b*). This definition of concealment, reſtrained to the efficient motives and preciſe ſubject of any contract, will generally hold to make it void in favour of either party who is miſled by his ignorance of the thing concealed.

Cicero's rule.

How underſtood.

The inſured may be innocently ſilent as to what the underwriter knows as well as he, however he may have come by his knowledge; *Scientia utrinque par pares contrahentes facit.* The inſured therefore needs not mention what the underwriter *ought* to know, what he takes upon himſelf the knowledge of, or what he waves being informed of. The underwriter needs not to be told what leſſens the riſk agreed upon, and is underſtood to be compriſed within the expreſs terms of the policy. He needs not to be told what is the reſult of political ſpeculations, or general intelligence: For inſtance, he is bound to know every cauſe which may occaſion natural perils; as the difficulty of the voyage; the variation of ſeaſons; the probability of lightning, hurricanes, &c.: He is bound to know every cauſe which may occaſion political perils, from the rupture of ſtates, from war, and the various operations of war: He is bound to know the probability of ſafety from the continuance and return of peace, from the imbecility of the enemy, the weakneſs of their councils, or their want of ſtrength.

The inſured need not diſcloſe what the underwriter knows, or what he ought to know.

Nor what leſſens the riſk.

Nor general topicks of ſpeculation.

What the inſurer is preſumed to know.

(*a*) Per Lord *Manſfield*, in *Carter* v. *Boehm*, 1 *Bl.* 594, 3 *Bur.* 1909.—(*b*) Cic. de off. l. 3, c. 12, 13.

If an underwriter inſure private ſhips of war from ports to ports, and from places to places, any where; he needs not be told the ſecret enterprizes upon which they are deſtined; becauſe he knows that ſome expedition muſt be in view; and, from the nature of the caſe, he waves the information. If he inſure for a certain term, he needs not be told any circumſtance to ſhew that the riſk may be over in leſs time: Or if he inſure a voyage, with liberty of deviation, he needs not to be told what tends to ſhew that there will be no deviation.

Neither is it neceſſary to communicate to the underwriters that the ſhip inſured is foreign built, though this enabled her to ſail without convoy, and without a licenſe to do ſo, being within the exception in the ſtat. 38 *G.* III. c. 76, § 6; it being the buſineſs of the underwriter to obtain this information for himſelf (*a*).

Things need not be diſcloſed, which are equally open to both parties.

Men argue differently from natural phenomena and political appearances: They have different capacities, different degrees of knowledge, and different intelligence: But the means of information and judging upon thoſe ſubjects are open to both: Each profeſſes to act from his own ſagacity; and therefore neither needs to communicate to the other.

Thoſe things only need be diſcloſed, which the one privately knows, and the other has no reaſon to ſuſpect.

The reaſon of the rule which obliges the parties to a mutual diſcloſure of all material information, is to prevent fraud and promote good faith: But it is applicable to ſuch facts only as vary the nature of the contract, which one party privately knows, and the other is ignorant of, and has no opportunity of knowing, nor any reaſon to ſuſpect. The queſtion, therefore, in caſes of concealment, muſt always be, whether there was, under all the circumſtances, at the time the policy was underwritten, a full and fair ſtatement, or a concealment: Fraudulent, if deſigned; or, though not deſigned, varying materially the object of the policy, and changing the riſk underſtood to be run (*b*); and in both caſes avoiding the contract.

(*a*) R. *Long* v. *Bolton*, 2 *Pul.* & *Boſ.* 209,—(*b*) Per Lord *Mansfield* in *Carter* v. *Boehm*, 1 *Bl.* 594, 3 *Bur.* 1909.

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It is a rule, that it is unneceſſary to make any communication or diſcloſure of that which the inſured undertakes for by a warranty expreſs or implied; and therefore it is not neceſſary that there ſhould be any repreſentation as to the ſtate or condition of the ſhip previous to the effecting of the policy; becauſe, in every contract of inſurance, there is an implied warranty that the ſhip is ſea-worthy. This was determined in the following caſe.

There need be no previous repreſentation as to the ſtate of the ſhip, that being covered by the implied warranty that ſhe is ſea-worthy.

An inſurance was made on a ſhip and cargo from *Madeira* to *Charleſtown*.—The ſhip being captured in her voyage to *Charleſtown*, an action was brought on the policy, in which it appeared that the captain had wrote two letters from *Madeira* to the owner, ſtating that the ſhip had been very leaky on her voyage thither, and that the pipes of wine had been half covered with water: But, in anſwer to this, it was proved that the leak had been completely ſtopped before the ſhip ſailed from *Madeira*.—It was inſiſted, however, that the not diſcloſing of the two letters was a material concealment which avoided the policy.—Lord *Mansfield* told the jury, "that there was no neceſſity to communicate the letters to the underwriter, or to ſhew the condition of the ſhip or cargo at the end of the former voyage. "It is true," ſaid he, "that there ſhould be a repreſentation of every thing relating to the riſk, which the underwriter has to run, except it be covered by a warranty. But it is a condition, or implied warranty, in every policy, that the ſhip is ſea-worthy, and therefore there is no neceſſity for a repreſentation of that. If ſhe ſail without being ſo, the policy is void. The letters might be material evidence to ſhew that the ſhip was leaky in her outward voyage; and if nothing had been done to her at *Madeira*, there would have been ground to ſuppoſe that ſhe was not ſea-worthy when ſhe ſailed from thence. But the fact now appears that the leak was ſtopped, and ſhe was in good condition before ſhe ſailed from *Madeira*:" Accordingly there was a verdict for the plaintiff.

Letters, therefore, from the captain, deſcribing the bad ſtate of the ſhip in her outward voyage, need not be ſhewn to the underwriters in a policy on a ſubſequent one.

Sheolbred v. Nutt, at N. P. after Hil. 1784, MS.—S. C. *Park*, 229.

Nor is it neceſſary to ſtate what may reaſonably be preſumed.

Emerigon (a) mentions a caſe from which it may be inferred that, in ſome inſtances, the ſtate of the ſhip ought to be repreſented to the inſurers, and that, in others, the inſurers will be preſumed to know that the ſhip is not ſea-worthy. That was the caſe of a ſhip taken by a *French* privateer, after an action in which ſhe loſt her main and mizen maſts. The captain of the privateer brought the prize to an anchor, and immediately ſent orders to get her inſured, which was done, but without mentioning the ſtate ſhe was in. The ſhip being retaken by the *Engliſh*, the inſurers objected to pay the loſs, becauſe the debilitated ſtate of the ſhip had not been ſtated to them. They were condemned, however, to pay the full ſum inſured, upon the ground that they ought to have preſumed that a veſſel captured, after a battle, muſt have been damaged.

Or what either party may know.

The following caſe will ſhew that the inſured is not bound to diſcloſe a circumſtance made material by a foreign ordinance, which may be known by either party, but which neither is bound to know, and which neither in fact knows.

Nor a circumſtance made material by a foreign ordinance, of which he was ignorant.

Mayne v. Walter, E. 22 *G.* III. B. R. MS.—S. C. *Park* 195.

An inſurance was made on a *Portugueze* ſhip, warranted neutral, at and from *Madeira* to her port of diſcharge in *Jamaica*, with liberty to touch at the *Leeward Iſlands*.—The ſhip was captured by a *French* privateer, and condemned in the court of admiralty in *France*, on the ground of her having an *Engliſh* ſupercargo on board; the *French* having lately made an ordinance to authorize this, ſimilar to one made in 1756.—In an action to recover this loſs, it was inſiſted for the defendant, that the plaintiff ought to have diſcloſed to him that the ſupercargo was *Engliſh*.—But it was determined by Lord *Mansfield* and the court, that if neither party knew of this arbitrary ordinance, which was againſt the law of nations, neither was guilty of any fault. If the defendant knew of it, he ought to have enquired what ſupercargo was on board. But, in this caſe, both being ignorant of this ordinance,

(a) Vol. 1, p. 172.

both

both were innocent; and in ſuch caſe, the underwriter muſt run all riſks.

I ſhall conclude the preſent chapter with the following ſingular caſe, which, though not upon a marine policy, turned upon a queſtion of concealment.

The governor of a fort abroad inſures it againſt capture for a year: It is not neceſſary to diſcloſe his ſpeculations on the probability of an attack.

Carter v. *Boehm*, 3 *Bur.* 1905, 1 *Bl.* 593.

An inſurance was made for a year, from the 16th of *October* 1759, againſt the capture of *Fort Marlborough*, in the iſland of *Sumatra*, by an enemy; for the benefit of the governor *Geo. Carter*.—The governor's inſtructions for the inſurance were dated the 22d of *September* 1759, and the policy was ſigned in *May* 1760. The fort was taken by Count *D'Eſtaigne* within the year, viz. in *April* 1760, and an action brought to recover the loſs.—On the trial it was objected that there was fraud on the part of the inſured, by the concealment of circumſtances which ought to have been diſcloſed; particularly the weakneſs of the fort, and the probability of its being attacked by the *French*. This was offered to be proved by two letters; one from the governor to *R. Carter* his brother and agent; and the other to the *India* company, from which it appeared that the *French*, being unable to relieve their friends on the coaſt, were the more likely to make an attack on this ſettlement, which they had deſigned to take by ſurprize the year before; and that the broker who effected the policy, on his croſs examination, ſaid that *in his opinion*, theſe letters ought to have been produced or the contents diſcloſed; for if they had, the policy would not have been underwritten. —In reply to this, it was ſhewn that the governor had 20,000 l. in effects in the fort, and only inſured 10,000 l.; that it did not appear that the *French* had any deſign to make the attack till the end of *March*; that the governor had acted as in full ſecurity down to *February*, and in that month turned his money into goods; and that, though his office was mercantile and not military, he was guilty of no fault in the defence of the place, which was not calculated to reſiſt an *European* force, but only for defence againſt the natives.—The plaintiff had a verdict. —A new trial was moved for, on the ground that all the circumſtances were not ſufficiently diſcloſed to the under-

writers.—But the court, after time taken to deliberate, were clearly of opinion that the plaintiff was intitled to recover, and that the verdict ought to ſtand.—Lord *Mansfield*, in delivering the opinion of the court, ſaid;—"The contingency was, whether *Fort Marlborough* would be attacked by an *European* power, by *ſea*, between *October* 1759 and *October* 1760. If it was, it muſt be taken, being incapable of reſiſtance. The underwriter in *London*, in *May* 1760, could judge much better of the probability of this contingency, than governor *Carter* could at *Fort Marlborough* in *September* 1759. He knew the ſucceſs of the operations of the war in *Europe*, what naval forces the *Engliſh* and *French* had ſent to the *Eaſt Indies*, and whether the ſea was open to any attempt from the *French*. He knew, or might have known, every thing which was known at *Fort Marlborough* in *September* 1759, of the general ſtate of affairs in the *Eaſt Indies*, or of the particular condition of *Fort Marlborough*, by the ſhip which brought the orders for the inſurance *(a)*. Under theſe circumſtances, he inſures againſt the general contingency of the place being attacked by an *European* power. If there had been any deſign on foot or enterprize begun in *September* 1759, it would have varied the riſk underſtood by the underwriter, on account of his not being told of a particular deſign *then ſubſiſting*. But the governor had no notice of ſuch a deſign, nor was there, in fact, any ſuch deſign. The attempt was made without premeditation, from the ſudden opportunity of a favourable occaſion, by the connivance of the *Dutch* which tempted *D'Eſtaigne* to break his parole.—As to the *firſt* concealment, that he did not diſcloſe the condition of the place,—The underwriters knew that the inſurance was for the governor, who muſt be acquainted with the ſtate of the place, and

(*a*) There is nothing in the report of this caſe from whence it can be fairly inferred, that the underwriter knew, or might have known, all theſe things. The probability ſeems to be the other way; nor is it any excuſe for a concealment, that the underwriter might, by enquiring, have learned all that it was neceſſary for him to know.

who

who could not diſcloſe it conſiſtently with his duty *(a)*; but, by inſuring, he apprehended at leaſt the probability of an attack. With this knowledge, and without aſking a queſtion, he underwrote; and, by ſo doing, he took the knowledge of the ſtate of the place upon himſelf; though it was a matter about which he might have been informed various ways: It was not a matter within the private knowledge of the governor only. But, independent of that, it is enough if the fort was in the condition in which it ought to be, which was only to reſiſt the natives; in like manner as that a ſhip inſured is preſumed to be ſea-worthy. The contingency inſured againſt was, whether the place would be attacked by an *European* force, and not whether it would be able to reſiſt ſuch an attack, if the ſhips could get up the river. It was found that this was the contingency in the contemplation of the parties.—The *ſecond* concealment was, his not having diſcloſed that the *French*, not being able to relieve their friends on the coaſt, might make an attack on him. This was mere ſpeculation dictated by fear, and not a fact in the caſe. It was a bold attempt for the conquered to attack the conqueror in his own dominion. The practicability of it depended on the *Engliſh* naval force in thoſe ſeas, of which the underwriter could better judge at *London* in *May* 1760, than the governor at *Fort Marlborough* in *September* 1759.—The *third* concealment was that he did not diſcloſe the deſign of the *French* to attack the place the year before. That deſign reſted merely in report; but taking it in the ſtrongeſt light, it is the report of a deſign the year before; but then dropped.—Another ſilence, not objected to was, that it appeared by the governor's letter to his agent, that he was appre-

(*a*) The argument here uſed is not quite conſiſtent with a ſubſequent part of this judgment, where, to prove that no fraud was imputable to the governor, it is ſaid,—"By the ſame "conveyance which brought his orders to inſure, he wrote to "the company every thing which he knew or ſuſpected; and "deſired nothing to be kept a ſecret which he wrote either "to them or his brother."

henſive of a *Dutch* war: That he had good grounds for this apprehenſion appeared from the ſubſequent conduct of the *Dutch*, to whom the loſs of the place was owing. The reaſon why the counſel did not object to this concealment was, becauſe it muſt have ariſen from political ſpeculation, and general intelligence; and it is not neceſſary to diſcloſe ſuch things to an underwriter.—With reſpect to the opinion of the broker, the jury were not bound to pay the leaſt regard to it. It was mere opinion, after the event. If rightly formed, it could only be drawn from the ſame premiſes from which the court and jury were to determine the cauſe; and therefore improper and irrelevant in the mouth of a witneſs.—With reſpect to the governor, there was no ground to impute fraud to him. By the ſame conveyance which brought his orders to inſure, he wrote to the company every thing he knew or ſuſpected. He deſired nothing to be kept ſecret which he wrote to them or to his brother (*a*). The reaſon of the rule againſt concealments is, to prevent fraud and encourage good faith (*b*). If the defendant's objections were to prevail, in the preſent inſtance, the rule would be turned into an inſtrument of fraud. The underwriter, knowing that the governor apprehended danger, and that he muſt have ſome ground for his apprehenſion, being told nothing of either, ſigned the policy, without aſking a queſtion. If the objection, "that he was not told" be ſufficient to vacate it, he took the pre-

(*a*) What he wrote to the company was not likely to be made public, and therefore not likely to come to the knowledge of the underwriter! What he wrote to his brother ought to have been diſcloſed: And though this concealment might not be imputable to the governor as a *fraud*, yet its effect in avoiding the policy would be the ſame. It is ſaid that he deſired nothing to be concealed: But a concealment without the deſire, or even againſt the will, of the inſured, will avoid a policy. Vid. ſup. 335.—(*b*) We have his Lordſhip's authority, and the authority of plain reaſon for ſaying, that a concealment may avoid a policy, and yet be quite innocent. Vid ſup. 347.

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mium, *knowing* the policy to be void *(a)*, in order to gain if the alternative turned one way, and make no ſatisfaction, if it turned out the other. There was not a word ſaid to him of the affairs of *India*, or the ſtate of the war there, or the condition of *Fort Marlborough*. If he thought that omiſſion an objection at the time *(b)*, he ought not to have ſigned the policy, with a ſecret reſerve in his own mind to make it void: If he diſpenſed with the information *(c)*, and did not think this ſilence an objection then, he cannot take it up now after the event."

I have ſtated this celebrated caſe, and the arguments in ſupport of the judgment, more at length than was conſiſtent with the plan of this work; and I have taken the liberty to make ſome ſhort remarks, in the form of notes, on ſeveral paſſages, which appeared to me diſputable. For with all the veneration and deference which I feel for the diſtinguiſhed character and talents of the noble perſon who delivered that judgment, the duty of the taſk which I have impoſed upon myſelf obliges me to declare, that I have not been able to ſatisfy my own mind that it is warranted even by the principles which his lordſhip himſelf lays down as the baſis of it (*d*). A ſtronger caſe of an inſurance againſt the policy of the law could ſcarcely be put than one in which the inſured lays himſelf under the neceſſity either of revealing that

(*a*) How could the underwriter *know* that the policy was void by reaſon of a concealment, without knowing what was concealed? Upon whom does the obligation lie; the inſured to diſcloſe what he knows, or the underwriter to fiſh it out by aſking queſtions? The argument goes to prove, that if the underwriter aſk no queſtions, the inſured is obliged to diſcloſe nothing; which is true only with reſpect to matters of public notoriety.—(*b*) How could he judge of the omiſſion, without knowing what was omitted?—(*c*) How could he be ſuppoſed to diſpenſe with information when the ſilence of the inſured was, according to all practice, a proof that he had none to communicate.—(*d*) Theſe principles which are, in general, abſtract propoſitions of indiſputable truth, and are laid down with admirable clearneſs and preciſion, will be found in the beginning of this chapter.

which

which his duty as governor forbade him to diſcloſe, or of concealing from the underwriters thoſe things which it was material for them to know, and which juſtice would require him to communicate. It is ſaid, however, "that the caſe ſo ſeldom happens, that little danger is to be apprehended from the example."—That ſuch an inſurance is without example may be urged as one argument againſt its legality. But if a contract, which is contrary to principles of public convenience be once ſanctioned by high authority, no man can foreſee to what extent the miſchievous principle may afterwards be carried.—But then it is alſo ſaid, "that this objection could not, upon any ground of juſtice, be made by an underwriter, who knew the inſured to be governor at the time he took the premium."—This goes to prove that an underwriter who takes a premium upon an inſurance which he knows to be illegal, cannot afterwards object to the illegality of it.—This, *as between the inſurer and the inſured*, would undoubtedly be juſt: But principles of public convenience demand that the juſtice of the caſe, as between the parties, ſhall ſometimes yield to a higher conſideration, namely, the probable operation of the precedent upon public morals, or the public intereſt *(a)*.

(a) Vid. ſup. 49.

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